TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 903.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL., APPELLANTS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED DECEMBER 26, 1911.

(22,979.)

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a UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and Proceedings Had and Done at a Regular Term of the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi, Begun and Held on the 16th Day of October, A. D. 1911, That Being a Day of the Regular August, 1911, Term of said Court, Held in the City of Biloxi, Mississippi, in said Division and District, as Designated by Law for the Holding of said Court.

Were present and in attendance: The Honorable H. C. Niles, Judge of the United States District Court of Mississippi, presiding; Robert C. Lee, United States Attorney; F. W. Collins, United States Marshal, and L. B. Moseley, Clerk of said Court.

Among the said pleas and proceedings had and done were the following, to-wit:

1 To the Honorable the Judges of the United States Circuit Court for the Southern District of Mississippi:

Complainant, the Louisville and Nashville Railroad Company, brings this its bill of complaint, against the Railroad Commission of the State of Mississippi, F. M. Lee, president, and John A. Webb and W. R. Scott, Members of said Commission; R. V. Fletcher, the Attorney-General of the State of Mississippi, and B. P. Harrison, the District Attorney of the State of Mississippi for the Second Circuit Court District of said State, and shows to your Honor:

First.

That Complainant is a railroad corporation created and organized under the laws of Kentucky, and has its principal place of business in Louisville, Kentucky, and is a citizen of said state. The defendants are each citizens of the State of Mississippi; that the Railroad Commission is a body politic created by and organized under the laws of Mississippi and is a citizen of the State of Mississippi, and has its official residence fixed by law at Jackson in the County of Hinds in said State; and the defendants, F. M. Lee, President, and John A. Webb and W. R. Scott, members of said Commission are each citizens of the State of Mississippi, and have their official residences as members of said Commission in Jackson, Hinds County, Mississippi. The defendant, R. V. Fletcher, is the Attorney-General of the State of Mississippi, and resides in Jackson, in the County of Hinds, in the State of Mississippi, and the defendant, B. P. Harrison, is the District Attorney for the Second Circuit Court District, and resides in Leaksville, in the County of Green, State of Mississippi, and within the Southern Division of the Southern Judicial District of the United States for the State of Mississippi; and that the value of the matter in controversy in this cause exceeds two thousand dollars, exclusive of interest and costs.

Second.

Complainant owns and operates, as a common carrier of freight and passengers, a railroad that extends from the city of Cincinnati, in the State of Ohio, through the City of Louisville, in the State of Kentucky, the City of Nashville, in the State of Tennessee, and the cities of Decatur, Birmingham, Montgomery and Mobile, in the State of Alabama, and the cities of Pascagoula, Biloxi, Gulfport, and Bay St. Louis, in the State of Mississippi, to the City of New Orleans in the State of Louisiana, and to and from many other cities in said states, and in other states of the United States. Its said railroad passes through the counties of Jackson, Harrison and
2 Hancock, in the State of Mississippi, all of which said counties are in the second circuit court district of said state. Defendant is and has been, for more than twenty-five years, engaged in the business of a common carrier of both interstate and intrastate freight and passengers in said State of Mississippi, and, as such, has transported and still continues to transport daily both freight and passengers between points in the State of Mississippi as well as freight and passengers from points in other states to points in Mississippi, and from points in Mississippi to points in other states, and from points in other states, through the State of Mississippi, to points in still other states.

Third.

The railroad so owned and operated by complainant in the State of Mississippi extends from the City of Mobile, through the counties of Jackson, Harrison and Hancock, in the State of Mississippi, to the City of New Orleans in the State of Louisiana, and was originally built by a corporation created by and organized under the laws of the State of Alabama under the name of the New Orleans, Mobile and Chatanooga Railroad Company. The name of said corporation was subsequently changed by an act of the Legislature of the State of Alabama to the New Orleans, Mobile and Texas Railroad Company. The said company mortgaged its property and franchises, and made default under the terms of its said mortgage; its property and franchises were foreclosed and sold to satisfy said mortgage, and the purchasers at said sale organized a new corporation under the name of the New Orleans, Mobile and Texas Railroad Company, as reorganized, and thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and description, except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and intrastate freight and passengers as aforesaid.

Fourth.

The act of the Legislature of the State of Alabama by
3 which said New Orleans, Mobile and Chatanooga Railroad Company was created and under which it was organized, among other things, authorized said corporation to hold real and personal property for the purposes and business of said corporation

within the State of Alabama and within any other state, sovereignty or government that might sanction, authorize and permit the same. Said charter also conferred upon it the right to enjoy and exercise all the rights, powers and privileges pertaining to corporate bodies necessary for the objects and purposes of said act, with the power and privilege and authority to exercise said corporate powers within the State of Alabama, and also within any other state of the United States that should recognize the existence of said corporation, and sanction, authorize, or permit the exercise of said corporate powers of said corporation within its limits.

By said act it was declared that the general purposes and objects of said corporation, the pursuit and furtherance of which was granted by said act, was, among other things, to contract and build, and thereafter to own, maintain, manage and use a railroad, upon such a course and on such a route and with such track, or tracks thereupon as might be deemed by the directors of said corporation most proper and expedient and best adapted to and for the public accommodation, from some suitable point in the City of Mobile towards and to any point on the line between the State- of Alabama and Mississippi in Mobile County, and to construct, and build, own, maintain, manage and use a railroad in like maner in continuation and as a part of said railroad within the limits of the State of Alabama, and from its termination within said limits to the City of New Orleans in the State of Louisiana, through the territory of the State of Mississippi and Louisiana.

It was further authorized and empowered by said act to take, transport, carry and convey persons and property upon said railroad by power or steam, or by any other power, and to receive for such transportation, carriage and conveyance, such tolls and charges as should be, from time to time, established and fixed and regulated by the directors of said corporation.

4 It was further authorized and empowered by said act to exercise the rights of eminent domain, and condemn the necessary lands for the purpose of its right of way, depot and other facilities.

It was further authorized to borrow money and execute bonds to secure the same by a mortgage upon its property and franchises.

By an Act of the Legislature of the State of Mississippi, approved February 7, 1867, the said New Orleans, Mobile and Chattanooga Railroad Company, as a corporation organized under and created by the laws of the State of Alabama, was recognized and approved as a body politic and corporate, with all of the powers, privileges, rights and franchises granted to it by said State of Alabama in and by its Act of incorporation. All of the provisions of the act of incorporation granted to said company by the legislature of Alabama were, by said act of the legislature of the State of Mississippi, adopted, confirmed and approved, so far as the same were applicable to the State of Mississippi, and said Company was vested with the powers, privileges and franchises granted to it in said act of incorporation, and was empowered and authorized to exercise and enjoy the same in the State of Mississippi, and to do and exercise and enjoy all the rights,

powers, privileges and franchises pertaining to corporate bodies within said state necessary for the full enjoyment and exercise of the rights, powers, privileges and franchises granted and secured to it by the act of its incorporation and necessary to secure, obtain and accomplish the objects and purposes of its incorporation in the same manner and with like powers and effect as if said company had been incorporated by virtue of a grant or law of the State of Mississippi.

Said company was, by said act of the legislature of the State of Mississippi, expressly authorized to construct and maintain and thereafter to manage, own and operate and use a railroad, with such tracks and suitable turnouts and upon such a course or route as might be deemed by a majority of the directors of said company most proper, expedient or necessary and best adapted for the public accommodation from any point between the State of Mississippi and the State of Louisiana, and thence to any point on the line between the
5 State of Mississippi and the State of Alabama, and said act further authorized said company to take, transport, carry and convey persons and property upon its said railroad and its boats, or both, by steam, or by any other power, and to receive for the same such tolls and charges as should be established by the directors of said company, and further conferred upon said company the right of eminent domain, and the right thereby to acquire, by condemnation proceedings, all such property as might be necessary for its rights of way, depot and other facilities.

Said act of the legislature of Mississippi further authorized and empowered said company to borrow money and mortgage its property and franchises to secure the same. A copy of said act is hereto attached and made part hereof.

The said railroad company so incorporated by the act of the legislature of the State of Alabama was likewise empowered by an act of the Legislature of the State of Louisiana to construct and operate its said road from a line between the State of Mississippi and the State of Louisiana, to New Orleans, in said State of Louisiana.

Four and One-half.

The said New Orleans, Mobile and Chattanooga Railroad Company was authorized, by an act of Congress approved March 2, 1868, (15 United States Statutes at Large, page 38), to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile for the use of said Company and the passage of its engines, cars, trains of cars, passengers, mails and merchandise thereon, and it was further provided by said act that said railroad and its bridges aforesaid, when constructed, completed and used in accordance with this act and the law of the several states through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures and a post road, and are hereby declared as such. The Complainant avers that ever since its said railroad was so constructed, it has been recognized and dealt with by the United

States as a post road, and it has been engaged in transporting,
6 as a common carrier of both interstate and intrastate commerce, the mails of the United States between the State of Mississippi and other states of the United States and Foreign Nations, and between points exclusively within the State of Mississippi, and Complainant is now under contract with the said United States for the transportation of said mails, and is daily so transporting the same. The said transportation of said mails between points wholly within the State of Mississippi constitutes "engaging in intrastate commerce within said state," and is forbidden by said act of the legislature of the State of Mississippi, approved March 20, 1908, herein complained of, and complainant avers that said act, in so attempting to prevent complainant from transporting the mails of the United States between points wholly within said state, interferes with the powers of Congress conferred upon it by the seventh paragraph of Section 8 of Article 1 of the Constitution of the United States to establish post offices and post roads, and said act is, for that reason, null and void, and complainant here invokes and relies upon the protection of the said provisions of the Constitution of the United States.

Complainant further alleges that there is no other railroad upon which the mails of the United States could be transported between many of the post offices situate in the State of Mississippi and between many of such post offices there are no established methods by which the mails could be transported other than complainant's said railroad, and no other method could be immediately established except at a great expense to the United States, or by subjecting said mails to great delays in transportation.

Fifth.

Under said several acts of the Legislature of the States of Alabama, Mississippi and Louisiana, and under said Act of Congress, approved March 2, 1868, and upon the faith thereof, the said New Orleans, Mobile and Chattanooga Railroad Company constructed said railroad from the City of Mobile, through the State of Mississippi, to the City of New Orleans, in the State of Louisiana, and expended therein large sums of money, and thereafter mortgaged its property and franchises, as it was authorized to do under said several acts of the legislature of said several states. Said mortgage was subsequently foreclosed, and the said property and franchises sold, and the purchasers thereof, on October 5, 1881, sold and conveyed said property and franchises to complainant who purchased the same upon the faith of the said several acts of the Legislature of the said several states, and has ever since, owned and operated said railroad as a common carrier of interstate and intrastate freight and passengers as hereinbefore alleged.

7 Sixth.

In and by said act of the legislature of the State of Mississippi granting said rights and powers to the said New Orleans, Mobile

and Chattanooga Railroad Company and the construction by said company of its railroad under said act, and upon the faith thereof, a contract was made and entered into by the State of Mississippi with the said New Orleans, Mobile and Chattanooga Railroad Company, and its successors and assigns, whereby said railroad company, and its successors and assigns, obtained the right to build and operate said railroad as a common carrier railroad of intrastate and interstate commerce, including the right to transport both freight and passengers.

And the plaintiff avers that the State of Mississippi is prohibited by the first paragraph of the tenth section of Article one of the Constitution of the United States from violating said contract, and complainant now invokes and relies upon the protection of the provisions of said Section 10, Article 1 of the Constitution of the United States against the enforcement of the laws of the State of Mississippi hereinafter referred to in violation of said provisions of the Constitution of the United States.

Seventh.

In addition to the said charter rights so conferred upon the complainant by the legislature of the State of Mississippi, the said State of Mississippi, by an act of its legislature, adopted in 1882, provided, among other things and in substance that when any railroad shall be sold under execution or under a deed of trust, or by a decree of a court enforcing a mortgage or other lien, the purchaser- thereof, and their assigns and successors, shall be entitled to and be invested with all the franchises, rights, powers, privileges and immunities appertaining to or possessed by the company or corporation whose property and franchises were sold. The provisions of said act with some modifications thereof now constitute Section 4065 of the Code of Mississippi of 1906. The said State of Mississippi has ever since the purchase of said property by the complainant assessed
8 said property for taxation against complainant and received payment of such taxes from it. By Sections 3875 and 3877 of the Annotated Code of the State of Mississippi that went into effect in 1890, each railroad company owning and operating a railroad in said state was required to file with the Railroad Commission of the State of Mississippi a complete schedule under oath, of all of its property, real and personal, and also the gross amounts of its receipts in the year preceding; the total amount of its capital stock, its par value, and its actual value and the value of its franchises and of many other things connected with the operation of said property, and the members of the Railroad Commission were constituted State Railroad Assessors, and were required to assess all railroads liable to taxation in the State of Mississippi, and to fix its true value so that such property should bear its just proportion of taxation, taking into consideration the value of the franchise and the capital stock engaged in the business in said state. Complainant shows that the original franchises granted to the New Orleans, Mobile and Chattanooga Railroad Company and acquired by complainant under its

said purchase have, ever since the year 1890, been, by the State of Mississippi, taken into consideration in fixing the value of complaintiff's property for taxation, and have been taxed since said law went into effect, and complainant has, from year to year, paid such taxes thereon. The State of Mississippi has also, through its said Railroad Commission, required complainant to file with it its tariff sheets of charges, and to post tariff notices and have made orders requiring it to establish stations and to stop at a point in a city other than its depot, and has, for many years, in many other ways, supervised the exercise by complainant of the said franchises so obtained by it under the charter of the New Orleans, Mobile and Chattanooga Railroad, and has, by said several acts, estopped itself to deny the right of complainant to operate the property and exercise the franchises and rights conferred by the legislature of Mississippi upon the said New Orleans, Mobile and Chattanooga Railroad Company as aforesaid.

9 Eighth.

By Sections 184 and 195 of the Constitution of Mississippi, which has been put into execution by Section 4839 of the Code of Mississippi, of 1906, Complainant is obliged to transport, as a common carrier, all freight and passengers tendered to it in the State of Mississippi for transportation to other points in said state, or in other states, and the legislature by said act violates said section, and complainants could not, under said provisions of the Constitution and laws of Mississippi, desist from and abandon its said intrastate business in the State of Mississippi without, at the same time, desisting from and abandoning its interstate business, and complainant avers that to either directly or indirectly require it to abandon its interstate business would operate as a regulation of and a direct interference with interstate commerce in violation of the provisions of paragraph 3 of Section 8 Article I of the Constitution of the United States vesting in Congress the power to regulate commerce with foreign nations and among the several states of the United States, and with the Indian Tribes, and Complainant here invokes and relies upon the protection of said provision of the Constitution of the United States.

Ninth.

Complainant's interstate and intrastate businesses are intimately connected and conducted as one business with one property and by one set of officers and employees, and complainant, upon the faith of the franchises obtained by it as aforesaid, and upon the faith of said provisions of the Constitution and laws of the State of Mississippi, has acquired a large amount of property necessary and convenient for the conduct of said intrastate business; it has built, and been required by the laws of the State of Mississippi, to build depots and depot facilities sufficient to accommodate both its interstate and intrastate business in the State of Mississippi, at an expense of hundreds of thousands of dollars, which said depots and other facilities are far in excess of what would have been necessary to enable it to

handle its interstate business alone, and if now deprived of the right to do an intrastate business in Mississippi, the burden of paying the interest upon the money so invested for the benefit of such intrastate business and of maintaining such expensive facilities will be thrown upon complainant's interstate business and become a charge thereon in further violation of the said third paragraph of Section 8 Article I of the Constitution of the United States, the protection of which complainant has heretofore invoked and now invokes and relies upon.

Tenth.

By said several matters, complainant has become subject to and is now within the jurisdiction of the said State of Mississippi, and to deprive it of the right to do an intrastate common carrier business therein would deprive it of the equal protection of the laws in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and complainant here relies upon and claims the protection of said provisions of the Constitution of the United States against the enforcement of the provisions of the Act of the Legislature of the State of Mississippi depriving, or attempting to deprive, it of the right to do intrastate business in said state, and of the right of eminent domain, and imposing penalties upon it for doing such intrastate business.

Eleventh.

Complainant shows to the court that on the 2nd day of June, 1908, the Railroad Commission of the State of Mississippi made the following order:

"1912.

CITIZENS OF BAY ST. LOUIS
against
L. & N. RAILROAD COMPANY.

Order to Stop on Flag.

This case came on for hearing on the petition, and after due notice to all parties and a full hearing of the cause; it is ordered by the Commission and the Louisville & Nashville Railroad Company are hereby directed to stop local passenger trains Nos. 7, 8, 11 and 12 to receive and discharge passengers on flag at Front Street Crossing in Bay St. Louis.

Effective June 29, 1908.

Ordered that the petition be dismissed as to the removal of the depot from its present site.

Order June 2, 1908."

And that subsequent thereto, it modified said order so as to substitute trains 9 and 10 for trains 11 and 12, and that on the 5th day of August, 1908, it caused a bill of complaint to be filed in the Chancery Court of Hancock County in the name of the State of

Mississippi, at the relation of R. V. Fletcher, Attorney-General of the State of Mississippi, and the Mississippi Railroad Commission, and F. M. Lee, President of said Commission and John A. Webb and W. R. Scott, members, against this Complainant, alleging that said order had been made by the Railroad Commission of Mississippi, and that complainant had disregarded and disobeyed the same, and prayed an injunction requiring observance by this complainant of said order of the Railroad Commission of Mississippi during the pendency of said cause, and that at the final hearing said injunction be made perpetual. On the 10th day of August, 1908, this complainant filed in the said chancery court a petition for the removal of said cause to the United States Circuit Court for the Southern Division of the Southern District of Mississippi, on the ground of diversity of citizenship of the several parties to said proceedings, and alleged that the said State of Mississippi was only a nominal party to said cause, and that the real parties in interest thereto were the Railroad Commission of Mississippi, and this complainant. Complainant likewise filed its bonds in due form for the removal of said cause. Copies of said petition and bonds are hereto attached and made part hereof.

11 On August 13th complainant caused said petition and bonds to be presented to the Honorable T. A. Wood, Chancellor for the said Chancery Court, moved that he accept and approve said petition and bonds, and make an order that said Chancery Court proceed no further in said cause. The said Chancellor made an order a copy of which is hereto attached, and made part hereof, wherein he said that the bonds so presented were in sufficient amount, and that the sureties thereto were satisfactory, but that in his opinion said petition showed no right in complainant to remove said cause and, for that reason, he declined to accept and approve said petition and bonds and make an order that said chancery court proceed no further in said cause. Thereupon, the complainant, on the 14th day of August, 1908, obtained a duly certified copy of the record and proceedings in the said cause from the Clerk of the said Chancery Court of Hancock County, and filed the same in the United States Circuit Court for the Southern Division of the Southern District of Mississippi, to which court said cause has thereby been removed and where it is now pending.

12

Twelfth.

By an act of the legislature of the State of Mississippi, approved March 20, 1908, it is provided as follows:

An Act Prescribing the Terms and Conditions on Which Foreign Public Service Corporations Shall Engage in Business in This State, and Fixing Penalties for Violation of Same.

Foreign Corporations Entering This State for Business Not to Remove Suits to Federal Court.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That any foreign railroad, sleeping car, electric railway, tele-

graph or telephone corporation, or other public service corporation whatsoever, now engaged in business in this State, or which may come into the State hereafter, and engage in business here, which shall, when sued in any court of this State, remove such cause to a Federal Court of this State, or which shall institute any suit in a Federal Court of this state, which it could not maintain if it were not a domestic company incorporated and organized under the laws of this State, shall:

(*a*) Forfeit its right to, and be prohibited from engaging in intra-state commerce within this State;

(*b*) Forfeit its right of eminent domain, and be prohibited from further exercising the same in this State.

Violation of This Act Forfeits Right to do Business in This State: Penalty Therefor.

And any such corporation so removing a cause to the Federal Court, or instituting a suit therein, and which shall thereafter continue to engage in intra-state commerce within this State shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such corporation shall continue to so engage in such commerce shall be a separate offense; the penalty in such case to be recovered by an action in the name of the State, at the relation of the Attorney-General, or any district attorney in whose district such offense may occur, and when so recovered shall be paid into the State treasury.

SEC. 2. That this Act take effect and be in force from and after its passage.

Approved March 20, 1908."

Under the provisions of the charter of the New Orleans, Mobile and Chattanooga Railroad Company, to which complainant has succeeded as aforesaid, and of the constitution and laws of Mississippi hereinabove referred to, it is complainant's duly to continue to do an intra-state common carrier business in the State of Mississippi, and it intends to continue to do said business until and unless the relief prayed by it in this bill of complaint is denied. Should it cease to do such intrastate business, it would not be able to earn upon the property devoted to its common carrier business in the State
13 of Mississippi more than the expense of doing said business, and would be liable to suits by all persons desiring to ship or travel upon complainant's road between points in the State of Mississippi who were refused such transportation by complainant.

Complainant further shows to the court that there is no railroad other than complainant connecting the counties of Jackson, Harrison and Hancock in the State of Mississippi by a direct route, and that all of the citizens of Jackson, Harrison and Hancock Counties are dependent upon the service of the complainant as a common carrier of intrastate passengers and freight for intercourse and commerce with each other, and that there is no other railroad in and passing through the City of Bay St. Louis, or in or through a num-

ber of towns and villages in the State of Mississippi, and that the only other railroad in or that passes through the City of Biloxi is an electric street passenger railroad extending from Biloxi to a point west of Long Beach, and said cities, towns and villages, other than Biloxi, are all wholly dependent on complainant's said road for the transportation of commerce and for intercourse with other parts of the State of Mississippi.

The defendant, the Railroad Commission of Mississippi, can under the laws of the State of Mississippi, cause to be instituted in its name by the defendant, R. V. Fletcher, Attorney General of the State of Mississippi, or the defendant, B. P. Harrison, District Attorney for the Second Circuit Court District for the State of Mississippi, a proceedings in equity to enjoin the complainant, the Louisville and Nashville Railroad Company from further doing an intrastate common carrier business in the State of Mississippi; and the defendant, R. V. Fletcher, Attorney-General of the State of Mississippi, and the defendant, B. P. Harrison, District Attorney for the Second Circuit Court District of Mississippi, or either of them, can, under the laws of Mississippi, institute in the Circuit Court of Jackson, Harrison or Hancock County, in the State of Mississippi, a quo warranto proceedings in the name of the State of Mississippi to oust the complainant of its right to do an intrastate common carrier business in said state, and the said defendants, or either of
14 them, can institute in either of said counties penalty suits in the name of the State of Mississippi, against complainant, the Louisville and Nashville Railroad Company to recover of it a penalty of not less than two hundred dollars, nor more than five thousand dollars, for each day that complainant has continued, and shall continue, to engage in intrastate business in the State of Mississippi since the tenth day of August, 1908.

Under the terms of said act of the legislature of Mississippi, approved March 20, 1908, and hereinabove set out, as well as under the provisions of the general laws of the State of Mississippi, it would be the duty of the defendant, R. V. Fletcher, as Attorney-General of the State of Mississippi, and of the defendant, B. P. Harrison, as District Attorney for the Second Circuit Court District of Mississippi, if said act of March 20, 1908, were a valid law and binding upon complainant, to institute in the Circuit Court of Jackson, Harrison or Hancock County, Mississippi, in the name of the State of Mississippi, quo warranto proceedings, or statutory proceedings in the nature of quo warranto, against this complainant, the Louisville and Nashville Railroad Company to oust it from further carrying on an interstate common carrier business in the State of Mississippi, or to institute in the name of the Railroad Commission of the State of Mississippi other appropriate proceedings in equity to accomplish such purpose, and to institute, in the name of the State of Mississippi, other suits against complainant, the Louisville and Nashville Railroad Company, for the recovery of the penalties prescribed by said statute.

Complainant further shows to the court that the said defendant, R. V. Fletcher, Attorney-General of the State of Mississippi, on the

18th day of August, 1908, attempted to institute in the Chancery Court of Harrison county a statutory proceeding in the nature of quo warranto proceedings, to oust complainant of its right to do an intrastate common carrier business in the State of Mississippi, and to recover of complainant, the said Louisville and Nashville Railroad Company, penalties for continuing to do such business in the State of Mississippi, after complainant had removed the case
15 of the State of Mississippi, at the relation of the Mississippi Railroad Commission, and others, against it, as hereinabove alleged from the Chancery Court of Hancock County to the United States Circuit Court for the Southern Division of the Southern District of Mississippi, and for that purpose filed in said Chancery Court of Hancock County an information. A copy of said information so filed in the Chancery Court of Harrison County is hereto attached and made part hereof.

Under the laws of Mississippi, proceedings such as the defendant, R. V. Fletcher, has attempted to institute in the name of Mississippi in the Chancery Court of Harrison County is a special statutory proceedings, the exclusive jurisdiction of which is conferred by law upon the Circuit Court, and the said Chancery Court of Harrison County has no jurisdiction to adjudge any matter in such proceedings, or to adjudge, at the instance of the State of Mississippi, a forfeiture of complainant's rights to do an intrastate common carrier business in the State of Mississippi, nor to adjudicate penalties against complainant for doing such intrastate business, even if it were conceded that the right to do such business had been forfeited.

Complainant further avers that the said R. V. Fletcher, as the Attorney-General of the State of Mississippi, and the said B. P. Harrison, as the District Attorney of the second circuit court district, or one of them, pursuant to the duty which would be imposed upon them by law if such forfeiture act were valid and binding upon complainant will, unless restrained by this Honorable Court, institute in the Circuit Court of Jackson, Harrison or Hancock County, in the name of the State of Mississippi, appropriate quo warranto proceedings to oust complainant of the right to do an intrastate common carrier business in the State of Mississippi, or will institute in the Chancery Court of Jackson, Harrison or Hancock County, in the State of Mississippi, appropriate proceedings in the chancery court to enjoin complainant from further carrying on such intrastate common carrier business in said State of Mississippi, and will further institute in the Circuit Court of Jackson, Harrison or Hancock County actions in the name of the State of Mississippi to recover of complainant
16 penalties of not less than two hundred nor more than five thousand dollars for each day that it has, since August 10, 1908, and shall hereafter carry on an intrastate common carrier business in said State of Mississippi. Complainant further avers that in such proceedings in a court of equity an interlocutory injunction may issue without bond to answer for such damages as complainant, or the traveling public, may sustain by the issuance thereof, enjoining or restraining the defendant from carrying on such common carrier business while said cause is pending.

Thirteenth.

By reason of the power of the defendants to cause such injunction to issue, and by reason of the further fact that the penalties prescribed by said act of the legislature of the State of Mississippi are so large that if complainant be denied the right to test the validity of said act of the legislature otherwise than by a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Mississippi in a quo warranto proceedings, or in a proceedings in equity to enjoin complainant from doing such intrastate business, or in a suit upon such penalties, complainant would either have to abandon its right to do such intrastate business to its great and irreparable damage and to the great and irreparable damage of the citizens of Jackson, Harrison and Hancock Counties in the State of Mississippi, and subject itself to a large number of suits by persons demanding transportation of it between points in Mississippi, or incur the risk of penalties so large as to be ruinous to it, should it be mistaken in its rights to the relief hereby sought, and would further, in case of actions brought for the recovery of said penalties, be subjected to a multiplicity of suits and an enormous amount of costs and expenses in defending the same, for which it would have no redress.

Complainant shows to the court that by reason of the matters aforesaid, it is denied due process of the law, as well as the equal protection of the law guaranteed to it by the Fourteenth Amendment of the Constitution of the United States, and complainant here invokes and relies upon the protection of the said provisions of the said Fourteenth Amendment of the Constitution of the
17 United States.

Prayer.

In consideration whereof, and for as much as Complainant is remediless at law under the rules of the Common Law, and can have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable, and to the end that the defendants may hereinafter answer the several things hereinabove set forth as fully and as specifically as if the same were again repeated, and they were hereunto interrogated, complainant prays that an order may be made by this Honorable Court suspending the provisions of the said Act of the Legislature of the State of Mississippi, approved March 20, 1908, entitled "An Act prescribing the terms and conditions upon which foreign public service corporations shall engage in business in this state, and fixing penalties for violation of same," and that an injunction may issue out of this Honorable Court, restraining and enjoining the said Railroad Commission of the State of Mississippi, F. M. Lee, President, and John A. Webb and W. R. Scott, members of said Commission, and the defendant, R. V. Fletcher, Attorney-General of the State of Mississippi, and B. P. Harrison, the District Attorney for the Second Circuit Court District of the State of Mississippi, and their successors in office, from instituting, or causing to be instituted, prosecuting, or causing to be prosecuted, any quo warranto proceedings, or other proceedings

other than those now pending in the Chancery Court of Harrison County as in this bill of complaint alleged, to oust complainant of, or to prevent it from carrying on, the business of an intrastate common carrier railroad in the State of Mississippi, and from instituting, or causing to be instituted, prosecuting, or causing to be prosecuted, any other or further action at law or in equity, civil or criminal, to recover of the complainant any fines, forfeitures or penalties prescribed by the said act of the legislature of the said State of Mississippi, and that this Honorable Court will be pleased to fix a time and place for the hearing of a motion on behalf of complainant for the allowance of said injunction pendente lite, and will, in
18 the meantime, make a restraining order suspending such act of the legislature, and restraining the defendants hereinabove named from instituting, or causing to be instituted, prosecuting, or causing to be prosecuted, any proceedings or action at law or in equity other than those now pending in the Chancery Court of Harrison County as in this bill of complaint alleged, civil or criminal, until such motion for an injunction pendente lite can be heard, and complainant avers that it will suffer irreparable injury from delay, if such restraining order be not forthwith granted.

Complainant further prays that at the hearing of this case, the said act of the Legislature of the State of Mississippi be declared violative of the Constitution of the United States, and for that and other reasons unconstitutional and void, and that the said defendants, The Railroad Commission of the State of Mississippi, F. M. Lee, President, and John A. Webb and W. R. Scott, members of said Commission, and said R. V. Fletcher, Attorney-General of the State of Mississippi, and B. P. Harrison, the District Attorney for the Second Circuit Court District of the State of Mississippi, and the successors in office of each of them, be perpetually enjoined from instituting or causing to be instituted, prosecuting, or causing to be prosecuted, any proceedings of quo warranto, injunction or other proceedings, in law or equity, to oust this complainant of the right to do an intrastate business in the State of Mississippi, or enjoin or otherwise prevent it from continuing to carry on said business, other than said proceedings now pending in the Chancery Court of Harrison County as in this bill of complaint alleged, or from instituting, or causing to be instituted, prosecuting or causing to be prosecuted, any action at law or equity, civil or criminal, to recover of complainant any forfeitures, fines or penalties, for the violations of the provisions of said Act of the State of Mississippi, by continuing to do an intrastate common carrier business in the State of Mississippi.

And complainant prays that this Honorable Court will grant to it such other or further relief in the premises as in equity it may be entitled to.

19 May it please your Honors to grant to complainant a temporary restraining order as aforesaid, a writ of injunction as aforesaid, and writs of subpœna against the defendants, The Railroad Commission of the State of Mississippi, and F. M. Lee, President, and John A. Webb and W. R. Scott, members of said Commission, and against the said R. V. Fletcher, Attorney-General of the

State of Mississippi, and B. P. Harrison, the District Attorney of the Second Circuit Court District of the State of Mississippi, to appear in this court on some day to be therein named, to answer the premises and to abide by and perform such decrees as may be made therein, but to relieve complainant of the undue burden of proof, said answers will not be made under oath, as answers under oath are hereby expressly waived.

This is the first and only application for a restraining order in this case.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,
By GREGORY L. SMITH,
Dist. Att'y for Mississippi and County of Mobile.

GREGORY L. SMITH,
GREEN & GREEN,
Sol's for Complainant.

20 An Act in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a Corporation of the State of Alabama, and authorizing and empowering said Company to exercise and enjoy its corporate power and franchise in the State of Mississippi.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the New Orleans, Mobile and Chattanooga Railroad Company, a corporation incorporated, organized and existing under and by virtue of its act of incorporation, duly enacted by the Legislature of the State of Alabama, entitled an act to incorporate the New Orleans, Mobile and Chattanooga Railroad Company, approved November 24th, 1866, is hereby recognized and approved as a body politic and corporate, with all the powers, privileges, rights and franchises, granted to it by said State of Alabama, in and by its act of incorporation hereby adopting, confirming and approving all the provisions of said act of incorporation granted to said Company, so far as the same may be applicable to this State, and may be adopted, approved and confirmed thereby, and are not contrary to the general statutes thereof. The said Company is hereby invested with the powers, privileges and franchises granted to it, in its said act of incorporation, and is empowered and authorized to exercise and enjoy the same in this State, and to have, exercise and enjoy all the rights, powers and privileges and franchises pertaning to corporate bodies within this State, necessary for the full enjoyment and exercise of the said rights, powers, privileges and franchises granted and secured to it, by its said act of incorporation, and necessary to secure, attain and accomplish the objects and purposes of its incorporation in the same manner and with the like power and effect as if said Company had been incorporated by virtue of any grant or law of this State, subject only to the conditions, provisions and restrictions of this act, as hereinafter set forth and the general laws of this State.

21 SECTION 2. Be it further enacted, that to enable said Company to accompiish the purposes and objects of its incorporation, the furtherance and pursuit of which in this State is granted, the said Company is empowered and authorized;

First. To construct and maintain and thereafter to own maintain, manage and use a railroad, with such tracks and suitable turnouts, and upon such a course or route as may be deemed by a majority of the Directors of said Company most proper, expedient or necessary and best adapted for the public accommodation, from any point on the line between this State and the State of Louisiana, and thence towards and to any point on the line between this State and the State of Alabama, crossing and passing through this State between said points, with the power and authority to extend the said Railroad as contemplated in the said act of incorporation, from the western boundary of this State towards and to New Orleans, in the State of Louisiana, and from the eastern boundary of this State, towards and to the City of Mobile, in the State of Alabama and thence to other places as provided in said act of incorporation.

Second. To construct, establish or purchase, in this State and thereafter to own, maintain and use, suitable wharves piers, warehouses, steamboats, harbors, depots, stations and other works and appurtenances connected with, and incidental to said railroad and the business of said Company and by the Directors of said Company deemed necessary and expedient for said Company to own and manage.

Third. To take, transport, carry and convey persons and property upon its said railroad and its boats by power of steam or any other power and to receive for the same such tolls and charges as shall be established by the Directors of said Company.

Fourth. To obtain and receive by purchase, grant, gift, devise and bequest and to have and to hold real and personal estate
22 in the State of Mississippi, for the objects, purposes and business of said Company and to the extent provided and set forth in its said act of incorporation excepting that in the taking and holding of lands for the use of said Company, as lands taken for public use, the said Company shall take and obtain the same as in this act provided.

Fifth. To lay out its said Railroad, and to construct the same, not exceeding two hundred feet in width, upon any lands of the State, and to take, hold and use for the purpose of necessary depots, stations cuttings, turnouts and for obtaining stone, gravel, earth and timber for the construction of its said Railroad, any lands of this State lying along or upon or adjacent to the route or course of said Railroad that may be necessary for the construction, maintenance and security of such railroad, Provided however, That any and all damages that may be occasioned or that may arise, to any person, Corporation or association other than the State of Mississippi, by the taking and using of such lands and material for the use of said Company as aforesaid shall be assessed and paid for by said Company as provided in this act.

Sixth. To construct and maintain its said Railroad or any part

of the same and to have the right of way therefor, across, or along or upon any waters, water course, river, bay, inlet, street, highway, turnpike, or canal within this State, which the course of said railroad may intersect, touch or cross; Provided, The said Company shall preserve any water course, street, highway, turnpike, or canal, which its said Railroad may pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public, unnecessarily, or if temporarily impaired in and during the construction of said Railroad, the said Company shall restore the same to its former estate, or to such a state that its usefulness and convenience to the public shall not be unnecessarily or materially impaired or injured; and that it is also provided that said Company is authorized and empowered to construct and maintain its said Railroad over
23 and across any of the waters of this State on the line of the same by bridges; Provided, However, That in the Central portion of the channel of the Pearl River, of the Bay of St. Louis, of the Bay at Biloxi, and of the East Pascagoula River, and in each of them, said Company shall construct and maintain a draw-bridge, which when open, shall give a clear space for the passage of vessels, of not less than sixty feet in width and said Company, after the construction of the said draw-bridges, shall, at all times thereafter, provide that said draw-bridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay; Provided, However, That in case the Company shall locate the line of their road across the channel of the Regolet at a point south of or below the principal entrance of Pearl River into the Regolet, then the said Company shall not be required to construct a draw-bridge across any bayou leading into Pearl River, or across any small pass or mouth of said River. It is also provided that such part of this section as relates to Pearl River, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to, and authorized the same, or said Company has built such a bridge across said Pearl River, for its said Railroad, as shall be in accordance with this section, and also with any authority or power granted to said Company by the said State of Louisiana in the premises, and such draw-bridge may be built in the center of the channel of said Pearl River or in that portion of the same within the territory of the State of Louisiana or of this State as most convenient for public use.

Seventh. That the said Company is hereby authorized and empowered to obtain by grant or otherwise from any incorporated City or village within this State that may be situated upon its Railroad any rights privileges or franchises that any of said incorporated cities or villages may choose to grant, in reference to the construction, management, maintenance of the Railroad of said Company, its depots, cars, locomotives and its business within the limits
24 of such, or any of said incorporated cities and villages and any such incorporated city or village as hereinbefore named, is hereby authorized and empowered to grant to said Company any

such rights, privileges and franchises as it may deem proper and advisable; and such rights, privileges and franchises when granted to and accepted by said Company from any such incorporated city or village, shall be deemed and taken as rights, privileges and franchises vested and confirmed in said Company, and not liable to be thereafter revoked, changed, injured or impaired, except with the consent of said Company.

SECTION 3. Be it further enacted, That said Company being hereby authorized to purchase, receive and hold such real estate as may be necessary and convenient in accomplishing the object for which this Company is organized, it may, by its agents, surveyors, engineers, and servants enter upon all lands and tenements through which it may conclude to make such railroads, and survey, lay out and construct the same; and may agree and contract for the land, or right of way with the owner of the land through which it intends to make such roads; in case said lands belong to the estate of any deceased persons, then with the executor or administrator of such; or in case of the same belonging to a minor, or person non compos mentis, then with his or her guardian; or in case said lands be held by Trustees of School Sections, or other trustees of estates, then with such trustees, and said executors, administrators, guardians and trustees are hereby declared competent for such estate, person or minor to contract with said Company; to use occupy and possess the lands of such estates, persons, minors or trustees, so far as may be useful or necessary for the purpose of said railroads; and the acts and deeds of such executors, administrators, guardians or trustees in relation thereto, shall pass a title to such lands, in the same manner as if the said deed or act was made or done by a legal owner of full age and sound mind; and such executor, administrator, guardian or trustee shall account to those interested in their respective bonds, for the amount paid him in pursuance of such agreement and composition. And if said Company and the parties representing lands, prefer, they may refer the question of compensation to arbitrators, mutually chosen whose award, or that of their umpire (in case of disagreement) shall vest title according to its terms.

SECTION 4. Be it further enacted, That if said Company is unable to agree for the purchase of any real estate, or the right of way thereupon, or any estate therein, required for the use and purposes of said Company, as provided in the preceding section, or is unable for any cause, to obtain the title or right of way therein, it shall have the right to acquire title to the same in the following manner:

The said Company may apply to the Supreme Court for the appointment of Commissioners of appraisal at any general or special term, or to any Judge thereof in vacation; or it may apply to any Circuit Court of the County in which the said land lies, at any general or special term, or to any Judge thereof in vacation. Such application shall be made in writing and signed by the President or one of the Directors of said Company, or by an agent or attorney of said Company authorized for that purpose and shall substantially set forth and state: First, It must be entitled so as to describe the

Court wherein, or the Judge to whom the application is made, and the character of the application. Second, the name and official character of the person applying in behalf of the Company must be stated. Third, The real estate which the Company seeks to acquire must be described by metes and bounds, and the estate therein which the Company seeks to acquire must be set forth, and several parcels of land owned by different persons may be included in one application. Fourth, That the Company has not been able to
26 acquire the estate in said lands required and the reasons of such inability. Fifth, The names of all owners or parties interested in said real estate, so far as the same are known to the applicant, must be set forth, and if not known that fact must be stated. A copy of such application and notice of the time and place (the same will be presented) must be served on all persons named in said application as owners, or interested in said real estate, at least five days prior to the presentation of the same, provided such owners so named are residents, and can be found within the State, and are not infants, idiots or persons of unsound mind.

SECTION 5. Be it further enacted, That on presentation of the application to the Court or Judge therein named, and no person appearing to oppose said application, and whenever it shall satisfactorily appear from said application and proofs thereunto attached, that service of notice of the time and place of the presentation of said application upon all the owners and persons interested in said lands has been made, the said Court or the Judge thereof, shall forthwith make an order appointing three disinterested and competent persons who reside on the county where the premises are situate, or an adjoining county thereto, as commissioners, to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken by said Company for its purposes and shall fix the time and place for the first meeting of said Commissioners. In case any person who shall be the owner or who shall have a vested interest in said premises, shall appear at the time and place of the presentation of such application, the said Court or Judge, before making said appointment of Commissioners, may hear such persons and said Company, in relation to any person proposed for appointment as such Commissioners, their place of residence, their competency and interest; and after such hearing of the Court or Judge shall make an appointment of three Commissioners as aforesaid, in accordance with the discretion and judgment of said Court or Judge. In case it shall
27 appear by said application that any person, or any of the persons owning or interested in the said premises described in the application or any part of the same are not known to the said Company, or are not residents of the county or state wherein said real estate is situate, or cannot be found therein after due diligence, or are infants, idiots, or persons of unsound mind, then and in such case the Judge, before making said appointment of Commissioners, shall make such inquiries as to such owners and parties interested in said premises and shall make such orders for service of notice upon them, or upon any person in regard to said application, and such

other order or orders in the premises as the said Court or Judge may deem necessary, proper and just, and shall then make such appointment of Commissioners as aforesaid and in connection therewith make such orders as to the service of any future notice upon the owners of said premises of the meeting and appointment of said Commissioners, and the confirmation of the same, as may seem to said Court or Judge equitable and just.

SECTION 6. Be it further enacted, That the Commissioners so appointed, or a majority of them, shall hold their first meeting at a time and place appointed by the Court or Judge and may adjourn from time to time at their discretion. They shall take and subscribe an oath before any officer authorized to administer oaths in the State of Mississippi to the effect that they and each of them will impartially and to the best of their judgment and ability perform the duties of said Commissioners. Any one of said Commissioners may issue subpœnas and administer oaths to witnesses whenever they meet to take testimony or hear the parties, except by the appointment of the said Court or Judge, or pursuant to adjournment they shall cause reasonable notice of such meeting to be given to any of the parties in interest, who shall have theretofore appeared
28 before them or to their agent or attorney they shall hear the proofs and allegations of the parties, and reduce the same to writing; and after all the testimony offered in the case, that in the judgment of said Commissioners is pertinent to the value of said premises is taken, they, or a majority of them, shall, without unnecessary delay ascertain and determine the compensation which ought justly and equitably to be made by the said Company to the owners and persons in said real estate appraised by them, and said Commissioners shall take into consideration the advantages that the said owners or persons interested in said real estate may derive form the construction of said proposed railroad for which said real estate is proposed to be taken. They shall make a report in writing to the Court or Judge by whom they were appointed which shall contain the proceedings in the cases before them, with the minutes of the testimony taken by them, if any, and their award and determination. They shall be compensated for service of such Commissioners by the said Company, at the rate of five dollars per day for actual service.

SECTION 7. Be it further enacted, That on such report being made by said Commissioners, the Court or Judge shall appoint a time and place for the hearing of said Company, and of all parties interested in said lands, in regard to the confirmation of said report, and shall by order direct the manner and form of the service of any notice of the same upon any persons that in the judgment of the said Court or Judge, shall be notified and on the day of such hearing, if no person shall oppose the confirmation of the said report, the same shall be confirmed by the said Court or Judge, and an order shall be made reciting the proceedings of the appraisal, the confirmation of the same, and a description of the real estate, and directing to whom the money or value of said real estate is to be paid, or in what manner the same shall be deposited by said Company for the use and benefit

of said owners, and if any person shall appear to oppose the confirmation of said report, the said Court or Judge shall hear the parties for and against such confirmation, and if said Court
29 or Judge shall decide in favor of such confirmation, then the same proceedings shall be had in the premises as heretofore provided in case no person appeared to oppose said confirmation; and if said Court or Judge shall decide against such confirmation, an order shall be entered directing said Commissioners or other Commissioners named in said order to proceed to a re-appraisal of the said premises, the proceedings of which shall be afterward conducted as in the first instance, except that the appraisal and report of the Commissioners or the re-appraisal ordered shall be final and shall be confirmed by said Court or Judge, and the said Court or Judge confirming any appraisal as aforesaid shall be final and conclusive on all parties interested.

SECTION 8. Be it further enacted, That the order of the said Court or Judge confirming an appraisal of lands, as heretofore provided, or a certified copy of the same shall be filed in the office of the Clerk of the Circuit Court of the county in which the said real estate appraised shall be situated, and there shall remain a record; and such order so entered and filed, shall vest in said Company, the lands described therein, and such estate as may be therein set forth, on the payment or tender of payment or deposit of the amount of the appraisal and damages by said Company as provided in said order, and said order, or a duly certified copy thereof, with proof of such payment and deposit as therein provided, will be considered a legal evidence of the title and estate of said Company to the real estate described therein. All real estate acquired by said Company under and pursuant to this act shall be deemed to be acquired for public use.

SECTION 9. Be it further enacted, That the said Company shall be exempt from all taxes in the said State of Mississippi, of whatever name or nature, including State, County, City, Town, and all municipal taxes, except that a State Tax of three per centum on all dividends declared and paid to the Stockholders of said Company, from time to time shall be paid by said Company to the States through and in which the said Railroads of said Com-
30 pany shall be constructed and maintained, as provided in this act, and the amount of said tax paid to each State shall be in the same proportion to the whole amount as the length of said Railroads, or either of them, constructed and maintained in each State shall bear to the collective length of said Rail-Roads constructed and maintained in all of the said States, and the proportion of said tax to be paid to this State shall be due and payable and shall be paid to the Treasurer of the State by said Company at the time any such dividends shall be so declared and shall be due and payable by said Company. Provided, However, That nothing in this act shall, in any manner whatsoever, be construed to deprive the State of its right to tax the passengers passing over said Railroad within limits of this State: Provided, further, however, That the State shall

not at any time levy upon such passengers a greater tax per mile for the distance traveled by them within this State than is at the same time levied upon the passengers passing over the other railroads within the State for each mile traveled by them within this State.

SECTION 10. Be it further enacted, That the said Company is hereby authorized to cross, intersect, join and unite its Railroad with any other Railroad hereinbefore or hereafter constructed in the State of Mississippi, at any point upon its route and upon the ground of such other railroad company with the necessary turnouts, sidings, switching and other conveniences in furtherance of the objects of its connections and every railroad company in the State of Mississippi, whose railroad shall be hereafter intersected by the railroads of this Company, shall unite with it in forming such intersections and connections and the division and apportionment of the cost and expense — the same between said Companies, the same shall be ascertained and determined by commissioners appointed by the Courts as is provided in this act, in respect to acquiring title to real estate.

31 SECTION 11. Be it further enacted, That said Company is empowered and authorized to purchase or lease from any railroad company or corporation its railroad and charter franchises, property and appurtenances thereof, and maintain and use the same as a part of the property of said Company and the said Company is also authorized and empowered to enter into any mutual contract with any other Railroad Company or corporation, by which the capital stock and property of such other company or corporation shall become merged and consolidated with this said Company, and into one joint and common stock, and be and exist as one Company, possessing and enjoying all the powers, franchises, rights and privileges granted to or vested in each and all of the companies so consolidated and united by this State or by other states through which the railroad of said Company, so consolidated and united may pass, the provisions of any statute heretofore passed by this State to the contrary notwithstanding.

SECTION 12. Be it further enacted, That this Company is authorized and empowered, from time to time, to borrow money, or purchase property upon its own credit, for the purpose of constructing and maintaining said Railroads, or establishing continuous and connecting lines of Railroad, as heretofore, and in its act of incorporation provided, and as evidence of indebtedness of the said Company for such loans or the purchase of such property, may issue its corporate bonds or promissory notes, bearing interest at a rate not to exceed eight per cent per annum, and to secure the payment of said bonds and notes may mortgage its railroad, its capital stock, its corporate franchises and any of its real or personal property, or any part or portion of the same, and it may, by its President or other officers and agents duly authorized by its Directors, sell dispose of or negotiate such bonds and notes, or may sell, dispose of or negotiate its capital stock, such capital stock being declared to be personal property, and transferable as such, or any of its
32 personal property, at such times and places and at such rates and for such prices, either within or without the limits of

this State, as in the judgment of said Company or its Directors will best advance its interest, and if such bonds, notes or stock are thus sold at a discount, such sales shall be in all respects valid and binding upon this Company, and such stock, bonds or notes shall be as valid for the par value thereof as if the same had been sold at par value.

SECTION 13. Be it further enacted, That the said Company can sue and be sued only in such Courts of this State as are Courts of record, and in such manner and form as Corporations of this State can be sued; and service of process in any action against the said Company can be made only by service of the same upon either the President, Secretary, Treasurer, or any of the directors of said Company, or upon any agent of the Company, resident of this State and designated by the Company to receive such service, and it shall be the duty of the Company to designate one of its agents residing within this State, as the agent upon whom such service of process can be made, and to give public notice thereof by advertisement, for four successive weeks, in a newspaper published at some place upon the line of its Railroad within this State, and like public notice shall be given whenever any change is made in such agency.

SECTION 14. Be it further enacted, That if any person or persons will or shall willfully do, or cause to be done, any act or acts whatever whereby any building, construction or work of said Company, or any engine, machine or structure, or any matter or thing appertaining to same, shall be stopped, impaired, weakened, injured or destroyed, the person so offending shall be deemed guilty of a misdo-
meanor, and shall forfeit and pay to the said Company double
33 the amount of damages sustained by reason of such offences or injury, to be recovered in the name of the said Company, with costs of suit by action of debt, and such offenders shall also be subject to indictment, and shall be sentenced, on conviction, at the discretion of the Court, for a period not exceeding eighteen months.

SECTION 15. Be it further enacted, That this act shall be favorably and liberally construed so as to favor all the purposes and objects of the same, and the operations of the provisions thereof.

Approved Feb. 7th, 1867.

34 In the Chancery Court of Hancock County.

STATE OF MISSISSIPPI at the Relation of R. V. FLETCHER and THE RAILROAD COMMISSION OF MISSISSIPPI
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

To the Honorable T. A. Wood, Chancellor of and for the Chancery Court of Hancock County, Mississippi:

Your Petitioner, the Louisville and Nashville Railroad Company, shows to your Honor that it is the defendant in the above entitled cause, which is a civil suit in equity, and that the amount and value of the matter involved in said cause, at the time of filing of the bill

of complaint, exceeded and now exceeds the sum of two thousand dollars, exclusive of interest and costs.

That the State of Mississippi is a mere nominal party plaintiff in said cause, and that the only real plaintiff in said cause is the Railroad Commission of Mississippi.

Said suit was brought by the Attorney-General under the direction and request of the Railroad Commission of Mississippi, and there is no law authorizing such suit to be brought in the name of the State of Mississippi by the Railroad Commission of the State of Mississippi, or the members thereof, or by the Attorney-General, or by both said Commission, its members, and said Attorney-General, but by and under the laws of the State of Mississippi the cause of action in said bill of complaint alleged is vested in the Railroad Commission of Mississippi and required to be brought in its name. Said suit is brought in the name of the State of Mississippi for the purpose of depriving the defendant of its rights under the laws of the United States to remove said cause to the United States Circuit Court.

Petitioner further shows that said order of the Railroad Commission sought by the bill of complaint filed in said cause to be
35 enforced is an unreasonable regulation of and interference with interstate commerce conducted by the defendant upon and by means of its said trains numbers 7, 8, 9 and 10, to which said order is applicable. Said trains 7 and 8 are trains operated daily for the transportation of passengers and mail between the City of New Orleans in the State of Louisiana, and the Town of Ocean Springs in the State of Mississippi, and between New Orleans and other points in the State of Louisiana, and other points in the State of Mississippi.

Said trains 9 and 10 are trains operated daily between the City of New Orleans in the State of Louisiana, and the City of Mobile, in the State of Alabama, upon which passengers are transported from and to the State of Louisiana, through the State of Mississippi, to and from the State of Alabama, and between intermediate points in said several states.

A considerable number of persons who reside during the whole year along line of Petitioner's road, from and including Biloxi, to and including Waveland in the State of Mississippi, do business in the City of New Orleans, and a large number of other persons who reside in New Orleans in the winter time, have their summer residences in the State of Mississippi from and including Ocean Springs to and including Waveland, and nearly all of these persons go from their homes in Mississippi to New Orleans every morning to attend to their business, and return to their homes in the evening. It is necessary to enable this to be done, that complainant operate trains between Ocean Springs and New Orleans, one of which leaves Ocean Springs in the morning, and the other leaves New Orleans in the evening, and that the schedules of such trains be as fast as is consistent with the business for the handling of which they are operated, but to accommodate the business for which such trains are operated, it is necessary that they make fifteen (15) stops in the State
36 of Mississippi, which includes all of the regular stopping points in said state, and said trains do make all of said stops.

Besides accommodating this business, these trains carry the United States Mail between Ocean Springs and New Orleans. These trains are known as numbers 7 and 8. Between the initial point of these trains in New Orleans and Dunbar, Louisiana, which is the station nearest to the western line of the State of Mississippi, there are eleven regular daily stops for passenger trains. Number 7 stops at but two of these points, and number 8 at but one of them, except on Sunday, when it makes four or those stops. These trains do not make any other stops between New Orleans and Dunbar, because to do so would increase the length of their schedules, and affect their efficiency for the accomplishment of the purpose for which they are operated, except that on Saturdays number 8 makes three additional stops to accommodate a large number of persons accustomed to visiting fishing clubs on those days. There have been frequent complaints made by the patrons of Petitioner's road regularly using these trains, because of the length of the present schedule and some of the former residents upon the Coast of Mississippi have moved therefrom on account of the length of such schedules, and many others would do so if the schedules of such trains were materially lengthened.

Petitioner's trains 9 and 10 are accommodation trains between the City of New Orleans and the City of Mobile. These trains are operated principally for the accommodation of people in the City of Mobile having business in the State of Mississippi upon the line of Petitioner's road, and in New Orleans, and are so scheduled as to enable such persons to leave Mobile in the morning, attend to their business, and return to their homes the same day. Train number 10 is also patronized largely by persons residing in the State of Mississippi and doing business in the City of New Orleans who
37 are unable to leave New Orleans sufficiently early to take Petitioner's Coast Train hereinabove described. The west bound train which is known as number 10 formerly left New Orleans at 6:00 and arrived at Mobile at 11:5 P. M., but as it was not infrequently late in arriving at Mobile, it sometimes arrived there after 12:00 P. M. at which hour the street cars in the City of Mobile cease to be operated. This gave rise to complaint on the part of the patrons of this train, and the leaving time from New Orleans was made an hour earlier to meet the demands of Petitioner's said patrons. These trains now stop at all of the regular stopping points between Mobile and New Orleans and any addition to said stops will still further lengthen their schedules.

The number of the passengers that would avail themselves of the privilege of entering upon and leaving the trains covered by the order of the defendant, the Railroad Commission, would not justify Petitioner in maintaining an agent to sell tickets at the point at which said order requires Petitioner's trains to stop, and the persons embarking upon its trains at such point would, for that reason, acquire the right to pay a regular ticket fare in cash, greatly to the disadvantage of Petitioner. Besides this, such stopping point would enable persons to ride upon Petitioner's trains between Petitioner's regular depot and such stopping Point, and the distance would not be sufficiently great to enable the conductors upon complainant's

trains to collect fares for such purpose, and this would result in the use of Petitioner's trains between such points without compensation.

Petitioner has already furnished to the City of Bay St. Louis reasonable transportation facilities for passengers desiring to go to or leave said city. The City of Bay St. Louis adjoins the town of Waveland which is west of it, and their respective limits are divided only by an imaginary line. Petitioner's road runs through the corporate limits of said two places a distance of 4:39 miles, and
38 the City of Bay St. Louis has an estimated population of 3,800 inhabitants, while Waveland has a population of not exceeding 1,200 inhabitants. The City of Bay St. Louis is bounded on the South and East by the Bay St. Louis, and extends along said Bay in somewhat crescent shape a distance of about 5 miles, with a width north a*b*d south of about one mile. Petitioner's said road enters said City from said Bay at a point nearly equidistant from the east and west corporate limits of said City, and extends thence in a northwesterly direction about a half of a mile to a point nearly equi-distant between the north and south corporate limits of said City, at which point it has established and maintained a passenger depot with ample accommodation for the public travelling upon Petitioner's railroad. Said railroad extends thence westwardly to the eastern corporate limits of Waveland, a distance of about 2 miles.

Petitioner operates daily five passenger trains from Mobile to New Orleans through Bay St. Louis, and a like number of trains from New Orleans to Mobile through Bay St. Louis. It also operates one daily, (except Sundays) train from New Orleans to Ocean Springs, and one daily train from Ocean Springs to New Orleans, and on Sundays and Wednesdays it operates two additional trains between New Orleans and Ocean Springs, one going east and one going west all of which said trains stop at Petitioner's depot in Bay St. Louis. Four of said trains going north or east, and six of said trains going south or west, reach Bay St. Louis in the day time. Petitioner's said trains 7 and 8 which are operated daily, except Sundays, and its excursion trains on Sundays and Wednesdays, and trains 9 and 10 operated daily in each direction between Mobile and New Orleans, in addition to stopping at said Station, stop at Nicholson Avenue, which is in the Town of Waveland but very near the corporate limits of Bay St. Louis, and about 2:01 miles west of the depot. Petitioner also stops two of its trains operated daily in each direction and in
39 addition said trains 7 and 8, at a point in Waveland at a distance of about 1:79 miles west of Nicholson Avenue, and two of said trains (numbers 9 and 10) stop daily at Clermont City, which is only 1:96 miles west of Waveland.

The point at which Petitioner is required by the order of the Railroad Commission of Mississippi to stop its said trains in Bay St. Louis is only 2681 feet from Petitioner's regular depot in said city, and when Petitioner stops its trains at both points, the rear end of its train at the last point at which it stops would not be more than between 1700 and 2200 feet distant from the point where its engine would stop in making the first of said stops.

There are no street cars in the City of Bay St. Louis, but a large number of the residents of Bay St. Louis own carriages in which they ride to and from the depot, and there are also a large number of public hacks that meet all trains arriving in the day and in the night and transport passengers to such point in the city as they desire to reach at very reasonable rates, and passengers desiring to go to or from points distant from the depot generally use their own vehicles or a hack for that purpose. Petitioner's depot at Bay St. Louis is as central with regard to the population of said City as any point upon the line of Petitioner's railroad. Well-kept streets lead from said depot to the point where the order of the Railroad Commission requires Petitioner to make such additional stops, and residences are built consecutively upon these streets. Streets also lead from said depot to every point in the City, and said depot is as accessible to every point in the city as any other point upon Petitioner's Railroad. The point at which the said order of the Railroad Commission requires Petitioner to stop its trains will be nearer than Petitioner's depot, and to that extent more accessible to one hotel and between thirty and forty residences, but would not be nearer or more accessible to any other part of the resident portion of the City.

Petitioner avers that said order being an unreasonable regulation of interstate commerce is void, and that the suit commenced by the Railroad Commission and the said R. V. Fletcher in the name of the State of Mississippi for the enforcement of said void order is not a suit by the State of Mississippi, but a suit by the said Railroad Commission.

Petitioner shows, as hereinabove alleged, that the controversy in the above entitled cause is between citizens of different states, and all of the plaintiffs were, at the time of the commencement of this suit, citizens of the State of Mississippi, viz.: The Railroad Commission of the State of Mississippi was, at the time this suit was brought, ever since has been, and still is a body politic created by and organized under the laws of Mississippi with its official residence fixed by law at Jackson in the County of Hinds in the State of Mississippi, and, as such, was and is a citizen of said State, and the several members constituting the said Commission were at said time and ever since have been, and still are, citizens of the State of Mississippi and reside therein, and that the said R. V. Fletcher likewise was, at said time and ever since has been and is a citizen of the State of Mississippi, and resides therein; that the said Railroad Commission has its official office established by law in the City of Jackson, County of Hinds and State of Mississippi, as aforesaid, and that the said R. V. Fletcher resides in the City of Jackson, County of Hinds. Your Petitioner, the Louisville and Nashville Railroad Company was, at the time of the commencement of said suit, ever since has been and still is a corporation created by and organized under the laws of Kentucky, having its head offices and principal place of business in the City of Louisville, in the State of Kentucky, and by reason of its said creation and organization, it is a citizen of said State.

Petitioner herewith tenders sufficient bonds in forms required by law for the removal of causes to the United States Court.

Wherefore, Petitioner prays that its petition and bonds may be accepted, and this suit may be removed to the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi, to be held at Biloxi, in the State of Mississippi, pursuant to the Statu-es of the United States in such cases made and provided, and that no further proceedings be had therein in this Court.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By CHARLES MARSHALL.

GREGORY L. SMITH,
Solicitor for Petitioner.

STATE OF MISSISSIPPI,
County of Hancock:

Personally appeared before me Clerk Chancery Court for said State and County, Charles Marshall, who being duly sworn, deposes and says that he is the Superintendent of the New Orleans and Mobile Division of the Louisville and Nashville Railroad Company, and, as such, is authorized to make this petition for and on behalf of the said Louisville and Nashville Railroad Company, and that the matters therein stated are true.

CHARLES MARSHALL.

Subscribed and sworn to before me this the 10th day of August, A. D. 1908.

E. H. HOFFMAN,
Clerk Chancery Court.

42 STATE OF MISSISSIPPI,
County of Hancock:

Know all men by these presents, That, we, the Louisville and Nashville Railroad Company, executing this instrument through Charles Marshall, one of its Division Superintendents, as principal, and The United States Fidelity and Guaranty Company, as surety, are hereby held and firmly bound unto the Railroad Commission of Mississippi in the sum of One Thousand Dollars ($1,000.00) for the payment whereof we bind ourselves, our personal representatives and assigns firmly by these presents.

In witness whereof, the said Louisville and Nashville Railroad Company has caused this instrument to be executed on its behalf, and in its name by Charles Marshall, its said Division Superintendent, and the said The United States Fidelity & Guaranty Company has caused it to be executed in its corporate name and under its corporate seal, this the 10th day of August, 1908.

The condition of the foregoing obligation is such, that, whereas the Louisville and Nashville Railroad Company has filed in the Chancery Court of Hancock County, its petition for the removal of

a cause pending therein, wherein the said Railroad Commission of Mississippi (under the style of the State of Mississippi at the relation of R. V. Fletcher, Attorney-General of the State of Mississippi, and the Mississippi Railroad Commission and F. M. Lee, President of said Commission, and John A. Webb and W. R. Scott, members) is the complainant, and the Louisville and Nashville Railroad Company is the defendant, to the United States Circuit Court for the Southern Division of the Southern District of Mississippi:

Now, therefore, should the said Louisville and Nashville Railroad Company enter in the said Circuit Court of the United States on or before the first day of its next session, a copy of the record in said suit, and well and truly pay the costs that may be awarded by the said United States Circuit Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this
43 obligation to be void, otherwise the same is to be and remain in full force and effect.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.
By CHARLES MARSHALL,
Superintendent New Orleans and Mobile Division of L. & N. R. R. Co.
UNITED STATES FIDELITY & GUARANTY COMPANY.
By JOSEPH F. CAZANEUVE,
CARL MARSHALL, *Attorneys-in-Fact.*

44 STATE OF MISSISSIPPI,
County of Hancock:

Know all men by these presents, that we, the Louisville and Nashville Railroad Company, executing this instrument through Charles Marshall, one of its Division Superintendents, as principal, and The United States Fidelity and Guaranty Company, as surety, are hereby held and firmly bound unto the State of Mississippi in the sum of One Thousand Dollars ($1,000.00) for the payment whereof we bind ourselves, our personal representatives and assigns firmly by these presents.

In witness whereof, the said Louisville and Nashville Railroad Company has caused this instrument to be executed on its behalf, and in its name by said Charles Marshall, and the said The United States Fidelity and Guaranty Company has caused it to be executed in its corporate name and under its corporate seal, this the 10th day of August, A. D. 1908.

The condition of the foregoing obligation is such, that, whereas, the Louisville and Nashville Railroad Company has filed in the Chancery Court of Hancock County in the State of Mississippi, and presented to the Chancellor for said Court, its petition for the removal of a cause, pending therein, wherein the said State of Mississippi at the relation of R. V. Fletcher, Attorney-General of the State of Mississippi, and the Railroad Commission, and F. M. Lee, President of said Commission and John A. Webb and W. R. Scott, mem-

bers, are the Complainants, and the Louisville and Nashville Railroad Company is the defendant, to the United States Circuit Court for the Southern Division of the Southern District of Mississippi:

Now, therefore, should the said Louisville and Nashville Railroad Company enter in the said Circuit Court of the United States on or before the first day of its next session, a copy of the record in said suit, and well and truly pay the costs that may be awarded by the said United States Circuit Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, then
45 this obligation to be void, otherwise the same is to be and remain in full force and effect.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By CHARLES MARSHALL,
Superintendent New Orleans and Mobile Division L. & N. R. R. Co.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOSEPH F. CAZANEUVE,
CARL MARSHALL, *Attorneys-in-Fact.*

46 STATE OF MISSISSIPPI at the Relation of R. V. FLETCHER, and the Railroad Commission of the State of Mississippi,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The Louisville and Nashville Railroad Company, the defendant in said cause, having presented to me its petition for the removal of the above entitled cause to the United States Circuit Court for the Southern Division of the Southern District of Mississippi, together with bonds which said petition and bonds have heretofore been filed in said cause in the Chancery Court for Hancock County: I, T. A. Wood, Chancellor for the Chancery Court for Hancock County, am satisfied with the amount of said bonds and the sufficiency of the surety thereto, but am of opinion that said petition shows no right in the said Louisville and Nashville Railroad Company to so remove said cause, and therefore decline to accept said petition and bonds, and decline to order that said cause proceed no further in the Chancery Court of Hancock County.

Made this the 13th day of August, A. D. 1908.

T. A. WOOD,
Chancellor for Hancock County.

47 STATE OF MISSISSIPPI,
Harrison County:

Chancery Court, October Term, 1908.

THE STATE OF MISSISSIPPI, Complainant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Original Bill.

To the Chancery Court of Harrison County:

Your Complainant, the State of Mississippi, by R. V. Fletcher, Attorney General of said State, would most respectfully represent and show unto the Court:

That the Louisville & Nashville Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and owns and operates a line of railway through the States of Kentucky, Tennessee, Alabama and Mississippi, and through the said County of Harrison in said State of Mississippi. The said railroad company is engaged in the business of transporting freight and passengers for hire through said State of Mississippi and as such is doing the business of a common carrier and is a common carrier. The said railroad company has a number of stations in the State of Mississippi where trains are regularly stopped and freights and passengers are thereat received and discharged. The said railroad company is engaged in the business of carrying freight and passengers for hire from points within the State of Mississippi to other points within said state and by reason thereof is now engaged in doing an intra-state business as a common carrier in said State of Mississippi.

The said Louisville & Nashville Railroad Company is a foreign railroad company, being incorporated as aforesaid under the laws of the State of Kentucky and never having been incorporated under the laws of the State of Mississippi.

On the — day of August 1908, the State of Mississippi through the Attorney General of the State of Mississippi and the Mis-
48 sissippi Railroad Commission and F. M. Lee, Jno. A. Webb and W. R. Scott members of said Commission, filed their bill of complaint in the Chancery Court of Hancock County, Mississippi, against the said Louisville & Nashville Railroad Company seeking to enjoin said company from disobeying the order of the said railroad commission relative to the stopping of the trains of said company at Bay St. Louis, Mississippi. Reference is hereby made to the said original bill and all pleadings and proceedings had in reference thereto, and same will be produced upon the trial of this cause if necessary. The said cause is numbered on the docket of the said Chancery Court of the said County of Hancock. After summons had issued and been served upon the said Louisville & Nashville Railroad Company, the said company, by appropriate procedure in the Circuit Court of the United States for the Southern

District of Mississippi, removed the said cause to the United States Circuit Court of the Southern District of Mississippi. The application, bond, order of the Circuit Court removing the said cause, writ of injunction and all proceedings had in regard thereto are hereby specially referred to and will be produced upon the trial of this cause if necessary.

The premises considered, Complainant therefore prays the Court that the said Louisville & Nashville Railroad Company be made party defendant to this bill of Complaint, that all necessary and proper process do issue, order be entered, and on the final hearing of the cause, a decree be entered adjudging and decreeing that the said Louisville & Nashville Railroad Company has forfeited all right to do any intra-state business within the State of Mississippi and perpetually enjoining said company from engaging in any intra-state business within the State of Mississippi, and further decreeing that the State of Mississippi recover of the said defendant company penalties in such amount as the Court shall adjudge, not less than two hundred dollars nor more than five thousand dollars for each day in which the said defendant company has continued to engage in intrastate commerce within the State of Mississippi after the removal of the said cause from the Chancery Court of Hancock County to the said United States Circuit Court of the Southern District of Missouri.

And if the relief herein specifically prayed for be insuf-
49 ficient or inappropriate, then Complainant prays for such further and general relief as to the Court may seem right and proper, and Complainant in duty bound will ever pray, etc.

R. V. FLETCHER,
Attorney General of the State of Mississippi,
Solicitor for the Complainant.

STATE OF MISSISSIPPI,
Hinds County:

This day personally appeared before me, the undersigned Clerk of the Supreme Court of the said State, R. V. Fletcher, Attorney General of the State of Mississippi, who being by me first duly sworn makes oath that the allegations of the above and foregoing bill of complaint as made of his own knowledge are true as stated and those made on information and belief, he believes to be true.

R. V. FLETCHER.

Sworn to and subscribed before me, this 11th day of August, 1908.

[SEAL.]

GEO. C. MYERS,
Clerk of Supreme Court.

Filed August 18, 1908.

F. S. HEWES, *Clerk.*

50 STATE OF ALABAMA,
County of Mobile:

Personally appeared before me, Rich'd Johnes, Clerk of U. S. Circuit court Sou. Dist. Alabama, at Mobile, one of Complainant's (Charles Marshall) Division Superintendents, and being sworn, deposes and says that he is one of the officers of the Louisville and Nashville Railroad Company, and as such, is authorized to make this affidavit on its behalf, and that the facts alleged in the foregoing bill of complaint are true.

CHAS. MARSHALL.

Subscribed and sworn to before me this the 22 day of August, A. D., 1908.

[SEAL.] RICH'D JONES,
Clerk U. S. Circuit Court, Sou. District of Alabama.

The foregoing bill having been read and considered: It is ordered that the — day of ——, 1908, at — o'clock be fixed for the hearing of the motion of the Complainant for an injunction pendente lite as prayed for in said bill of complaint. Said hearing will be had at —— and complainant will cause notice thereof to be given to the defendants:

It is further ordered that, upon complainant's giving bond in the sum of —— Dollars with good and sufficient sureties, payable to and to be approved by the clerk of the court, and conditioned to pay such damages as any person may sustain by the issuance of said restraining order, the act of the legislature of the State of Mississippi, approved March 20, 1908, entitled "An Act prescribing the terms and conditions upon which foreign public service corporations shall engage in business in this state, and fixing penalties for the
51-54 violation of the same," be and the same is hereby suspended and a restraining writ be issued as prayed for in the bill of complaint.

Made this the — day of August, A. D., 1908.

—— ——, *Judge.*

* * * * * * *

55 *Restraining Order.*

In the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. 76.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
v.
RAILROAD COMMISSION OF STATE OF MISSISSIPPI et al., Defendants.

The original bill in this cause having been read and considered, it is ordered that the second day of September, 1908, at ten o'clock A. M., be fixed for the hearing of the motion of complainant for an

injunction pendente lite, as prayed for in said bill of complaint. Said hearing to be had at Kosciusko, Mississippi, at chambers, and complainant will cause notice thereof to be given to the defendant.

It is further ordered that upon complainant giving bond in the sum of $5,000.00, with good and sufficient sureties payable to and to be approved by the Clerk of this Court, and conditioned to pay such damages as any person may sustain by the issuance of this restraining order, it is ordered that the Railroad Commission of the State of Mississippi, F. M. Lee, President, and John A. Webb and W. R. Scott, members of said Commission, and the defendant R. V. Fletcher, Attorney General of the State of Mississippi, and D. P. Harrison, the District Attorney for the Second Circuit Court District of the State of Mississippi, and their successors in office, until the further order of this court or the judges thereof, be and they are hereby restrained from instituting, or causing to be instituted, prosecuting or causing to be prosecuted, any quo warranto proceedings or other proceedings other than those now pending in the Chancery Cour- of Harrison County, styled State of Mississippi v. The Louisville & Nashville Railroad Company, as in said original
56–61 bill of complaint alleged, to oust complainant of, or prevent it from carrying on the business of an intrastate common carrier railroad in the State of Mississippi, and from instituting, causing to be instituted, prosecuting or causing to be prosecuted, any other or further action at law or in equity, civil or criminal, to recover of complainant any fines, forfeitures or penalties prescribed by an act of the Legislature of Mississippi, approved March 20th, 1908, entitled "An Act prescribing the terms and conditions upon which foreign service corporations shall engage in business in State, and fixing penalties for violation of the same," and that a copy of this restraining order be served upon defendants herein.

Ordered, adjudged and decreed this 27th day of August, 1908.

H. C. NILES, *Judge.*

Endorsed: Filed August 29, 1908, L. B. Moseley, Clerk, By Roy Chinn, Deputy Clerk. Entered M. B. No. 1, on page- No. 590-591.

* * * * * * *

62 *Supplemental Bill.*

In the United States Circuit Court for the Southern Division of the Southern District of Mississippi.

No. 76.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
RAILROAD COMMISSION OF MISSISSIPPI.

Comes the complainant, the Louisville & Nashville Railroad Company, and shows to the court that since the filing of its bill of complaint in the above entitled cau-e, R. V. Fletcher, who is defendant

therein, as Attorney General of the State of Mississippi, has resigned his said office, and that J. B. Stirling, who is over the age of twenty-one years, and resides in Jackson, in the County of Hinds, in the State of Mississippi, has been duly appointed and qualified as the Attorney General of the State of Mississippi, and now holds said office.

Complainant shows that as such Attorney General of the State of Mississippi said J. B. Stirling has the power to institute against the complainant the several proceedings which the bill of complaint in said cause alleges that the said R. V. Fletcher, as such Attorney General, possessed, and that it is now the duty of the said J. B. Stirling, as the Attorney General of the State of Mississippi, to institute the proceedings that it is alleged in the bill of complaint to have been the duty of said R. V. Fletcher as Attorney General to institute.

Complainant further shows to the court that the said J. B. Stirling, as such Attorney General, is now prosecuting against complainant the suit instituted by the said R. V. Fletcher in the name of the State of Mississippi in the Chancery Court of Harrison County to oust it of the right to do an intrastate business in the State of Mississippi, as alleged in the original bill of complaint, and that unless restrained by this Honorable ——.

63–65 STATE OF ALABAMA,
County of Mobile:

Personally appeared before me, Katharine Walsh, a Notary Public in and for said County, in said State, Gregory L. Smith, who being sworn deposes and says that he is the District Attorney for the State of Mississippi of the Louisville & Nashville Railroad Company, and, as such, is authorized to make this affidavit on its behalf, and that the statements contained in the foregoing amendment and supplement to the bill of complaint are true as therein set out.

GREGORY L. SMITH.

Subscribed and sworn to before me this 8th day of July 1909.

[SEAL.] KATHARINE WALSH,
Notary Public, Mobile County, Alabama.

I, J. B. Stirling, the Attorney General of the State of Mississippi, hereby consent that the foregoing amendment and supplement to the original bill of complaint in the above entitled cause shall stand allowed, and I hereby waive process and appear as defendant in said cause, and consent that the injunction pendente lite heretofore issued in said cause shall be treated as extended to me as Attorney General of the State of Mississippi; but I hereby expressly reserve the right to move to dissolve the injunction heretofore granted upon the ground that said injunction was wrongfully or improperly granted as against the said R. V. Fletcher and his successor in the office of Attorney General of the State of Mississippi.

Witness my hand this the 10th day of July, 1909.

J. B. STIRLING,
Attorney General.

Endorsed: Entered and filed this 17th July 1909. L. B. Mosely, Clerk, by Roy Chinn, Deputy Clerk.

* * * * * * *

66 *Partial Demurrer to Original Bill.*

In the Circuit Court of the Southern District of Mississippi.

No. 76.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
MISSISSIPPI RAILROAD COMMISSION.

Now come the defendants herein and file this their special demurrer to that part of the Bill of Complaint filed by Complainant and specially answered, and for grounds of demurrer, set up the following:

The Federal Court is without jurisdiction of this cause for the reason that the bill of complaint shows on its face that the complainant, the Louisville and Nashville Railroad Company, is a Mississippi corporation, and that the defendants are also citizens of Mississippi and that, therefore, there is do diversity of citizenship between the parties such as would give the Federal Court jurisdiction of the cause.

The bill of complaint shows on its face that, by the Act of the legislature of the State of Mississippi, approved February 7, 1867, the New Orleans, Mobile & Chattanooga Railroad Company, a corporation organized under and created by the Laws of the State of Alabama, was recognized and approved as a body politic and corporate with all the powers, rights, privileges, and franchises granted to it by said State of Alabama in and by its act of incorporation; and all of the provisions of the Act of Incorporation granted to said company by the Legislature of Alabama were by said Act of the Legislature of the State of Mississippi, above referred to, incorporated, adopted, confirmed, and approved so far as the same were applicable to the State of Mississippi, and the said company was vested with the powers, privileges and franchises granted to it in said act
67 of incorporation, and was empowered and authorized to exercise and enjoy the same in the State of Mississippi by the legislature of said State, and to do and exercise and enjoy all the rights, powers, privileges, and franchises granted to any other domestic corporation, and secured by the act of its incorporation and necessary to secure, obtain, and accomplish its objects and purposes.

The bill shows on its face that by a certain act of the Legislature of Mississippi of 1882 it was provided, among other things, in substance, that when any railroad shall be sold under execution or under a deed of trust, or by a decree of the court enforcing a mortgage or other lien, the purchaser- thereof, and their assigns and successors shall be entitled to and invested with all the franchises, rights, powers, privileges and immunities, appertaining to or possessed by the corporation or company whose property and franchises were sold;

and the bill shows on its face that the provisions of said act of 1882, with some modifications thereto, now constitute section 4065 of the Code of Mississippi of 1906.

The bill further shows on its face that all the property and franchises of the said New Orleans, Mobile & Chattanooga Railroad Company were sold to satisfy a certain mortgage, in accordance with the acts of 1882, and that complainant became the purchaser thereof on October 5, 1883, and has since owned said railroad and operated it and exercised ownership thereof; and that the complainant has the right and power to exercise all of the rights and powers conferred on it and its predecessors by the Mississippi Legislature as a Mississippi corporation.

This suit should be dismissed because at the time the suit in the case of State v. Louisville & Nashville Railroad Company was filed in the Chancery Court of Hancock County, Mississippi, there
68 was no federal question on the face of the bill which authorized its removal under the Constitution and Laws of the United States, and said suit is made an exhibit to this demurrer for the purpose of considering the same.

The defendants, therefore, allege that there is no jurisdiction in this court to entertain the bill of complaint herein, for other reason to be shown at the hearing.

S. S. HUDSON,
Attorney General.

I believe that this demurrer is well founded in point of law and is not filed for delay.

S. S. HUDSON,
Attorney General of the State of Mississippi.

Sworn to and subscribed before me this 1st May, 1911.

GEO. C. MYERS, *Clerk.*
By E. L. MYERS, D. C.

Endorsed: Filed May 2, 1911. L. B. Moseley, Clerk.

69 *Answer.*

United States Circuit Court of the Southern District of Mississippi.

No. 76.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
THE RAILROAD COMMISSION OF MISSISSIPPI.

Now comes the said defendants, John A. Webb, President, W. R. Scott and F. M. Shepard, members of the Commission, and S. S. Hudson, Attorney General of the State of Mississippi, and E. J. Ford, District Attorney of the State of Mississippi for the Second

Circuit Court District of the said State of Mississippi, by S. S. Hudson, Attorney General.

And now come the said defendants, by solicitors, saving and reserving unto themselves all the benefits and advantages that may be had or taken to the many errors and uncertainties, etc., in said bill of complaint contained, for answer thereto or to so much and such parts thereof as they are advised is material or necessary for them to make answer unto, say:

First.

Defendants admit that each of them are citizens of the State of Mississippi; that the Railroad Commission is a body politic created by and organized under the laws of Mississippi, and is a citizen of the State of Mississippi, and has its official residence fixed by law at Jackson in the County of Hinds of said State, and that the defendants, Webb, Scott and Shepard, members of said Commission, are each citizens of the State of Mississippi, and have their official residence, as members of said Commission, in Jackson, Hinds County, Mississippi. The defendant, S. S. Hudson, is Attorney General of the State of Mississippi, and has succeeded J. B. Stirling, who succeeded R. V. Fletcher, and resides in Vicksburg, Mississippi in the County of Warren thereof; and E. J. Ford is District Attorney duly appointed instead of B. P. Harrison, who has resigned the
70 office of District Attorney of the Second Circuit Court District, and resides at Pascagoula, in the County of Jackson, State of Mississippi, and within the Southern Division of the Southern Judicial District of the United States for the State of Mississippi; and that the value of the matter in controversy in this cause exceeds Two Thousand Dollars, exclusive of interest and costs.

Second.

Defendants neither admit nor deny that complainant owns and operates, as a common carrier of freight and passengers, a railroad that extends from the City of Cincinnati, in the State of Ohio, and through the City of Louisville, in the State of Kentucky, and the City of Nashville, in the State of Tennessee, and the cities of Decatur, Birmingham, Mobile and Montgomery, in the State of Alabama, and the Cities of Pascagoula, Biloxi, Gulfport and Bay St. Louis, in the State of Mississippi, to the City of New Orleans, in the State of Louisiana, and to and from many other cities in said States.

Defendants admit that this said railroad passes through the Counties of Jackson, Harrison, and Hancock, in the State of Mississippi, all of said counties being in the Second Circuit Court District of said State.

Defendants admit that this said railroad passes through the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, all of said counties being in the Second Circuit Court District of said State.

Defendants admit that the Louisville and Nashville Railroad has been for more than twenty-five years, engaged in the business of a

common carrier of both interstate and intrastate freight and passengers in said State of Mississippi, and, as such, has transported and still continues to transport daily both freight and passengers from points in other States to points in Mississippi, and from points in Mississippi to points in other States, and from points in other States, through the State of Mississippi, to points in still
71 other States.

Three.

Defendants admit that the railroad so owned and operated by complainant in the State of Mississippi extends from the City of Mobile, through the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, to the City of New Orleans, in the State of Louisiana, and was originally built by a corporation created by an organization under the laws of the State of Alabama, under the name of the New Orleans, Mobile and Chattanooga Railroad Company; that the name of said corporation was subsequently changed by an act of the Legislature of the State of Alabama to the New Orleans, Mobile and Texas Railroad Company; that the said Company mortgaged its property and franchises, and made default under the terms of its said mortgage, its property and franchises were foreclosed and sold to satisfy said mortgage; and the purchasers at said sale organized a new corporation under the name of the New Orleans, Mobile and Texas Railroad Company, as reorganized, and thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and description, except the franchise to be and exist as a corporation, to complainant, who has ever since owned and operated it as a common carrier of interstate and intrastate freight and passengers as aforesaid.

Fourth.

The defendants deny upon the face of the charter that the act of the legislature of the State of Alabama by which the said New Orleans, Mobile and Chattanooga Railroad Company was created and under which it was organized, among other things, authorized said corporation to hold real and personal property for the purpose and business of said corporation within the State of Alabama and within any other State, sovereignty or government that might sanction, authorize and permit the same, or that said charter also
72 conferred upon it the right to enjoy and exercise all the rights, powers and privileges pertaining to the corporate bodies necessary for the objects and purposes of said act with the powers and privileges and authority to exercise said corporate powers within the State of Alabama, and also within any other State of the United States that should recognize the existence of said corporation, and sanction, authorize, or permit the exercise of said corporate powers of said corporation within its limits.

Defendants admit that by said act it was declared that the general purpose and object of said corporation, the pursuit and furtherance of which was granted by said act, was, among other things, to contract and build and thereafter to own, maintain and manage and use

a railroad, upon such a course and on such a route and with such track or tracks thereupon as might be deemed by the directors of said corporation most proper and expedient and best adapted to and for the public accommodation, from some suitable point in the City of Mobile towards and to any point on the line between the State- of Alabama and Mississippi in Mobile County, and to contract and build, own, maintain, manage and use the railroad in like manner in continuance and as a part of said railroad within the limits of the State of Alabama, and from its termination within the city limits of the City of New Orleans in the State of Louisiana.

Defendants admit that it was authorized by said act to transport and carry and convey passengers and property upon said railroad by power of steam, or by any other power, and to receive for such transportation, carriage and conveyance, such tolls and charges as should be, from time to time, so fixed and regulated by the directors of said corporation.

Defendants further admit that complainants were authorized and empowered by said act to exercise the rights of eminent domain, and condemn the necessary lands for the purpose of its right of way, depots and other facilities.

73 Defendants further admit that they were authorized to borrow money and execute bonds to secure the same by a mortgage upon its property and franchises.

T*te* said defendants admit that the Company so incorporated by the act of the legislature of the State of Alabama was likewise empowered by an act of the legislature of the State of Louisiana to construct and operate its said railroad over a line between the State of Mississippi and the State of Louisiana to New Orleans, in the State of Louisiana.

Four and a Half.

Defendants admit that the New Orleans, Mobile and Chattanooga Railroad was authorized, by an act of Congress, approved March 2, 1868, (15 United States Statutes at Large, page 38), to contract, build, and maintain bridges over the navigable waters of the United States, on the route of said railroad between New Orleans and Mobile for the use of said Company and the passage of its engines, cars, trains of cars, passengers, mails and merchandise thereof, and it was further provided by act that said railroads and its bridges aforesaid, when constructed, built and used in accordance with this act and law of the several states through whose territory same shall pass, shall be deemed, recognized and known as lawful structures, and post roads, and are hereby declared as such.

The defendants further admit that ever since its said railroad was so constructed, it has been recognized and dealt with by the United States as a post road, and it has been engaged in transporting, as a common carrier of both interstate and intrastate commerce, the mails of the United States between the State of Mississippi and other States of the United States and foreign nations, and between points exclusively within the State of Mississippi, and complainant is now

under contract with the said United States for the transportation of said mails, and is daily so transporting same.

74 Defendants further deny as matter of law that said transportation of said mails between points wholly within the State of Mississippi constitutes "engaging in intrastate commerce within said State", and is forbidden by said act of the legislature of the State of Mississippi, approved March 20, 1908.

And defendants deny that said act prevents complainants from transporting the mails of the United States between points wholly within the State, interfere- with the powers of Congress conferred upon it by the seventh paragraph of Section 8 of Article 1 of the Constitution of the United States to establish post roads, and said act is void, and for the reason, null and void, and denies complainant's right to invoke and rely upon the protection of the said provision of the Constitution of the United States in this case.

Defendants admit that there is no other railroad upon which the mails of the United States could be transported between many of the post offices in the State of Mississippi along the line of its road, and that between many of such post offices there are no established methods by which the mails could be transported other than complainant's said railroad, and that no other methods could be immediately established except at a great expense to the United States, or by subjecting said mails to great de*al*y in transportation.

Fifth.

Defendants admit that under several acts of the Legislature of the States of Alabama, Mississippi and Louisiana, and under said acts of Congress, approved March 2, 1868, and upon the faith thereof, the said New Orleans, Mobile and Chattanooga Railroad constructed said railroad from the City of Mobile through the State of Mississippi, to the City of New Orleans in the State of Louisiana, and expended therein large sums of money, and thereafter mortgaged its property and franchises, as it was authorized to do under said several alleged acts of the Legislature of said several States, and that said

75 mortgage was subsequently foreclosed as alleged, and said property and franchises sold, and the purchasers thereof, o*n* October 5, 1881, sold and conveyed said property and franchises to complainant who purchased the same upon the faith of said several acts of the legislature of the said several states, and has ever since owned and operated the said railroad as a common carrier of interstate and intrastate freight and passengers as therein alleged.

Sixth.

Defendants deny that the State of Mississippi has violated any contract with the complainant and that it is prohibited by the first paragraph of the Tenth Section of Article One of the Constitution of the United States from violating said contract.

Defendants deny that complainants have a right to invoke and rely upon the protection of the provisions of said Section 10, Article One of the Constitution of the United States against the enforcement

of the law of the State of Mississippi hereinafter referred to, and deny that it is in violation of said provisions of the Constitution of the United States.

Seventh.

Defendants admit the allegations of paragrapg seven of the bill.

Eighth.

Defendants admit that under sections 184 and 195 of the Constitution and section 4839 of the Mississippi Code of 1906, complainant is obliged to transport as a common carrier all freight and passengers tendered to it in the State of Mississippi; but defendants deny that the said act of the Legislature here brought under review is in violation of said sections of the Constitution; and defendants admit that under said provisions of the Constitution the complainant could not abandon its intrastate business in the State of Mississippi without at the same time abandoning its interstate business, and defendants deny that the enforcement of the act of the Legislature here in review, directly or indirectly, is an interference with
76 interstate commerce in violation of Par. 3, section 8, Article 1 of the Constitution of the United States.

Ninth.

Defendants admit that in the conduct of either interstate or intrastate business that the complainant has expended large sums of money and made improvements and facilities at great expense; and admit that if the complainant is deprived of the right to do an intrastate business in Mississippi, that a burden will be imposed upon the complainant in interstate business, but deny that so to do will be a violation of Paragraph 3, section 8, Article 1 of the Constitution of the United States.

Tenth.

Defendants admit that complainant has become subject to, and is now within, the jurisdiction of the State of Mississippi; but deny as matter of law that an enforcement of the penalty imposed by the Act of the Legislature of 1908 would deprive it of the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the defenadnts deny that complainant has any right here to rely upon said amendment to prevent the enforcement of the provisions of said act of the Legislature imposing the penalties therein set out.

Eleventh.

Defendants admit that on the second day of June, 1908, the Railroad Commission of the State of Mississippi made a certain order and set out in the bill of complaint requiring certain trains of complainant to stop and receive and discharge passengers on flag at Front Street crossing in the City of Bay St. Louis; and admit that

this order was subsequently amended as set out in the bill of complaint.

And defendants admit that complainant disregarded and disobeyed the same and that the State of Mississippi, on the relation of R. V. Fletcher, Attorney General *of* the Railroad Commission, and F. M. Lee, President; and J. A. Webb and W. R. Scott, members thereof, filed a bill in the chancery court of Hancock
77 County against the complainant, praying an injunction requiring an observance by complainant of said order of the Railroad Commission.

Defendants admit that the complainant filed a petition of removal of said cause to the United States Circuit Court for the Southern Division of the Southern District of Mississippi on the ground of diversity of citizenship of the several parties; and admit that said petition was denied by the Hon. T. A. Wood, Chancellor of said Chancery Court, and admit that a certified copy of the record in said proceedings was obtained from the Clerk of the Chancery Court of Hancock County and filed in the United States Circuit Court for the Southern Division of the Southern District of Mississippi, where it is still pending, and the record of said suit styled State of Mississippi et als. v. Louisville and Nashville Railroad Company and numbered 75 on the docket of the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi is here made a part of this answer as if copied herein.

Twelfth.

Defendants admit that the Legislature of the State of Mississippi on March 20, 1908, passed an act entitled "An Act prescribing the terms and conditions on which foreign public service corporations shall engage in business in this State, and fixing penalties in violation of same"; as alleged in the bill of complaint and set out therein.

The defendants admit that under the Constitution and Laws of Mississippi and the provisions of the charter of the New Orleans, Mobile and Chattanooga Railroad Company, to which complainant has succeeded complainant had to continue to do an intrastate common carrier business in the State of Mississippi; but deny that the complainant has a right to cease to do such intrastate business, if the relief prayed in this bill of complaint is denied.

78 Defendants admit that if complainant should cease to do an intrastate business, it would not be able to earn upon the property devoted to its common carrier business in the State of Mississippi more than the expense of doing such business, and that it would be liable to suits by persons desiring to ship or travel upon complainant's road between points in the State of Mississippi, if they were refused such transportation by complainant.

Defendants admit that there is no other railroad *other* than complainant's connecting the counties of Jackson, Harrison and Hancock; and that the citizens of said counties are dependent upon the services of complainant as a common carier.

Defendants admit that under the law of the State of Mississippi, the Railroad Commission can by the Attorney General or the Dis-

trict Attorney for the second Circuit Court District of the State, institute proceedings for the enforcement and collection of the penalties prescribed by the Act of the Legislature of 1908 for a willful noncompliance with or disobedience *to* the said order of said Commission.

Defendants further admit that R. V. Fletcher, former Attorney General of the State of Mississippi, on the 18th day of August, 1908, instituted in the Chancery Court of Harrison County statutory proceedings in the nature of quo warranto, as alleged in said bill of complaint; and deni*es* that the Chancery Court of Harrison County is without jurisdiction to adjudicate matters and things set out in said proceedings.

The defendants admit that the Attorney General of the State and the District Attorney of the second Circuit Court District, or either of them, will be bound to institute quo warranto proceedings in the Circuit Court of Jackson, Harrison or Hancock Counties to oust complainant from carrying on such intrastate business or for the collection of the penalties.

79

Thirteenth.

Defendants deny that if complainant is denied the right to test the validity of the act of the Legislature otherwise than by a writ of error of the Supreme Court of the United States to the Supreme Court of the State of Mississippi in a quo warranto proceeding, or in a proceeding in equity to enjoin the complainant from doing such intrastate business, or in a suit upon such penalties, that complainant would either have to abandon its right to do intrastate business to its great damage or the damage of the citizens of the said counties of Jackson, Harrison and Hancock, and be subject to a large number of suits and incur the risk of penalties so large as to be ruinous, or be subject to a multiplicity of suits at an enormous cost, for which it would have no redress.

Defendants deny that by reason of any of the matters herein set out, it is denied the due process of law or equal protection of the law, as guaranteed by the 14th Amendment to the Constitution of the United States.

Conclusion.

Defendants emphatically deny that the Act of the Mississippi Legislature of March 20, 1908, is in violation of the Constitution of the United States or of the State of Mississippi, and deny that it is for that reason unconstitutional, and deny that it seeks to deprive complainant of any property or any right guaranteed to it by the Constitution or the law; but deny that the said order of the Railroad Commission is illegal or void; and deny that complainant is entitled to an injunction restraining the enforcement of said order of the Railroad Commission.

And now, having fully answered, defendants ask that said bill of

S. S. HUDSON,
Attorney General,

By ——— ———,
Ass't Attorney General.

complaint be dismissed, and the defendants discharged with reasonable costs.

80 This day personally appeared before me the undersigned Geo. C. Myers, Supreme Court Clerk of Mississippi, S. S. Hudson, Attorney General for the State of Mississippi, who first being duly sworn, states upon oath that the matters and facts set forth in the foregoing answer are true, and those stated upon information and belief, he verily believes to be true.

S. S. HUDSON,
Attorney General.

Sworn to and subscribed before me this 1st May, 1911.

[SEAL.] GEO. C. MYERS, *Clerk.*
By E. L. MYERS, *Deputy Clerk.*

Endorsed: Filed May 2, 1911. L. B. Moseley, Clerk.

81–83 *Replication.*

In the Circuit Court of the United States for the Southern District of Mississippi, at Jackson.

No. 76. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
RAILROAD COMMISSION OF MISSISSIPPI et al.

This replicant, the Louisville & Nashville Railroad Company, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Railroad Commission of Mississippi, et als., for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, the Railroad Commission of Mississippi et al., and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied to be this replicant; without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by said bill he hath already prayed.

____ ____,
Solicitors for Complainant.

Endorsed: Filed May 6, 1911. L. B. Moseley, Clerk.

* * * * * * *

84 *Agreement as to Hearing and Evidence.*

In the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. 76. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
MISSISSIPPI RAILROAD COMMISSION et als.

It is agreed between solicitors for complainant and defendant that this cause may be submitted and heard at the May term, 1911, of said Court at Jackson, and that the time for taking proof under the rules is waived, and that said cause may be heard on the original bill, partial demurrer, and partial demurrer and replication by the Court, and that setting the cause for hearing under this agreement shall not operate to admit the allegations of the answer.

That the cause may be heard upon the bill and answer and replication upon the testimony heretofore taken by affidavits under the agreement dated 27th day of January, 1911, and any other evidence that may be offered orally by either side on the hearing.

That the printed charter of the Louisville & Nashville Railroad Company, certified by Ben. L. Brunner, November 6, 1909, may be considered as duly proven to be the charter of the Louisville & Nashville Railroad Company.

That "An Act to incorporate the New Orleans, Mobile and Chattanooga Railroad Company of Alabama, approved November 24, 1866," may be read from the printed acts of Alabama in evidence.

That "An Act in relation to New Orleans, Mobile & Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said Company to exercise and enjoy its corporate power and franchises in the State of Mississippi," approved Feb'y 7, 1869, may be read in evidence from the printed
85–197 Acts of Mississippi.

That Chapter 25, Acts of Mississippi of 1882, may be read in ecidence from the printed Acts of Mississippi.

That any other printed statutes may also be read in evidence.

GREEN & GREEN,
GREGORY L. SMITH,
Att'ys for Complainant.
S. S. HUDSON,
Attorney General, for Defendants.

Endorsed: Filed May 8, 1911. L. B. Moseley, Clerk.

* * * * * * *

198 *Final Decree.*

In the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. 76.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI et al.

Upon motion of the defendant's Solicitors, the decree rendered herein on a former day of this term, should be and is hereby so modified as to read as follows:

Heretofore came the parties complainant and defendants, by their solicitors, and this cause being by them argued and submitted upon the special demurrer, and the court being sufficiently advised in the premises, and being of the opinion that the said demurrer is not well taken, it is therefore considered and so ordered, adjudged and decreed that the said demurrer be and the same is hereby overruled. The defendants thereupon, as to the matters in said demurrer, so far as the jurisdiction of the court is concerned, elected to stand thereon and declined to plead further, and then and there excepted to the action of the court.

And thereupon the defendants filed their answer to the Bill of Complaint, to which answer the plaintiff filed its replication, and thereupon came the parties complainant and defendants, by their solicitors, and said cause having been argued and submitted upon the pleadings and evidence, and the court being sufficiently advised in the premises, and being of the opinion that the complainant is entitled to the relief prayed, and that the interlocutory injunction heretofore granted should be made perpetual, it is, therefore, considered and so ordered, adjudged and decreed that the said Railroad Commission of the State of Mississippi, and John A. Webb, its President, and W. R. Scott and Dr. F. M. Shepard, its members,

199 each of whom has duly appeared therein, they being the successors in office of the members of said commission named in the original bill of complaint, and S. S. Hudson, the Attorney General of the State of Mississippi, (the successor in office of R. V. Fletcher), and E. J. Ford, District Attorney of the Second District of the State of Mississippi, (the successor in office of B. P. Harrison), each of whom has likewise appeared in said cause, and the successors in office of each of them, be and they are hereby perpetually enjoined from instituting, or causing to be instituted, prosecuting or causing to be prosecuted, any proceedings of quo warranto, injunction, or any other proceedings, at law or in equity, to oust the complainant of the right to do intrastate business in the State of Mississippi, or to enjoin or otherwise prevent it from continuing or carrying on said business other than the proceeding now pending in the Chancery Court of Harrison County, State of Mississippi, and styled on the docket of said court "The State of Mississippi against the Louisville

& Nashville Railroad Company," or from instituting or causing to be instituted, prosecuting, or causing to be prosecuted, any action, at law or in equity, civil or criminal, to recover of complainant any forfeiture, fines or penalties for the violation of the provisions of the Act of the Legislature of the State of Mississippi, entitled "An Act prescribing the terms and conditions upon which foreign and public service corporations shall engage in business in this State, and fixing penalties for the failure of the same," approved March 20, 1908, by continuing an intrastate common carrier business in the State of Mississippi, and that the surety on the injunction bond herein be and it is hereby discharged, and the complainant have and recover of defendants its costs in this behalf expended to be taxed, for which let execution issue.

200 And the court further orders, adjudges and decrees, over complainant's objection, that the defendants be allowed to appeal said cause upon the execution of a bond in the sum of One Thousand Dollars to the Supreme Court of the United States.

Ordered, adjudged and decreed this the 24th day of October, 1911.

H. C. NILES, *Judge.*

Endorsed: Filed October 24th, 1911, and entered Minute Book 2, pages 182-183-184.

201 In the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. 76.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI et als.

Final Decree.

Upon Motion of the defendants, by solicitors, the decrees rendered herein heretofore should be and are hereby, by consent, annul-ed and the court, instead thereof, said cause having been heard in vacation by consent, decrees as follows:

This cause having heretofore come on for hearing on the bill and special demurrer thereto, and the answer and replication, and the evidence, and came the parties complainant and defendants by their solicitors, and the court being sufficiently advised in the premises, and being of the opinion that the said demurrer is not well taken, it is therefore considered and so ordered, adjudged and decreed that said demurrer as to the jurisdiction of this court be and the same is hereby overruled, and the defendants thereupon as to the matters in said demurrer, so far as the jurisdiction of the court is concerned, elected to stand thereon, and declined to plead further, and then and there excepted to the action of the court, therefore the court finally decreed thereon. Then the court proceeded to decide the case on the merits, and being of the opinion that the complainant is entitled to

the relief prayed and that the interlocutory injunction heretofore granted should be made perpetual, to which action of the court the defendant takes no exception.

It is therefore considered and so ordered, adjudged and decreed that the railroad commission of the State of Mississippi, and John A. Webb, its President, and W. R. Scott and Dr. F. M. Shepherd, its members, and each of whom has duly appeared herein, and being the successors in office of the members of said commission named in the bill, and S. S. Hudson, Attorney General of the State of Mississippi, and being the successors in office of R. V. Fletcher and E. J. Ford, District Attorney of the second Court District of the State of Mississippi, and being the successor in office of B. P. Harrison, each of whom has appeared herein, and their successors
202 in office of each of them, be and they are hereby perpetually enjoined from instituting or causing to be instituted, prosecuting or causing to be prosecuted any proceeding of Quo warranto, injunction or other proceedings at law or in equity, to oust complainant of the right to do intrastate business in the state of Mississippi, or enjoin or otherwise prevent it from continuing to carry on said business, other than the proceedings now pending in the Chancery Court of Harrison County, State of Mississippi, as styled on the docket of said court "The State of Mississippi vs. Louisville & Nashville Railroad Company"; or from instituting or causing to be instituted, prosecuting or causing to be prosecuted, any action at law or in equity, civil or criminal, to recover of complainant any forfeitures, fines, or penalties for the violation of the provisions of the act of the Legislature of the State of Mississippi entitled "An Act prescribing the terms and conditions upon which foreign and public service corporations shall engage in business in this state and fixing penalties for violation of the same," approved March 20, 1908, by continuing to do an intrastate, common carrier business in the state of Mississippi, and that the sureties on the injunction bond be and they are hereby discharged and that complainant have and recover of defendants its costs in this behalf to be taxed for which execution may issue. And the court further ordered, adjudges and decrees over complainant's objections that the defendant be allowed to appeal said cause direct to the Supreme Court of the United States upon the execution of bond in the sum of $1,000.00 to the Supreme Court of the United States.

Ordered, adjudged and decreed this 28th day of October, 1911.

H. C. NILES, *Judge.*

Last Final Decree. Filed Oct. 28, 1911. L. B. Moseley, Clerk, by Roy Chinn, D. C. E. M. B. No. 2, Page- 191 & 2.

203 *Bond on Writ of Error.*

In the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. 76.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI et als.

Know all men by these presents, That we, the Railroad Commission of the State of Mississippi, et als., and the Fidelity and Deposit Company, as surety, are held and firmly bound unto the Louisville & Nashville Railroad Company, in the full and just sum of one thousand dollars, to be paid to the said Louisville and Nashville Railroad Company, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 10th day of November, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a term of the Circuit Court for the Southern Division of the Southern District of the State of Mississippi, in a suit pending in said court between the Railroad Commission of the State of Mississippi et als., and the Louisville & Nashville Railroad Company, a decree was rendered against the said Railroad Commission of the State of Mississippi, et als., and the said Railroad Commission of the State of Mississippi, et als., having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Louisville & Nashville Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

204 Now the condition of the above obligation is such, that if the said Railroad Commission of the State of Mississippi, et als., shall prosecute *its* writ to effect, and answer all costs; if the Railroad Commission of the State of Mississippi, et als., — make*s its* plea good, then the above obligation is void; else to remain in full force and virtue.

Sealed and delivered in the presence of

JOHN A. WEBB,
President Mississippi Railroad Commission.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By H. V. WATKINS, *Attorney in Fact.*

Attest:
L. C. DAMERON, *Agent.* [SEAL.]

Approved by

—— ——,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed this November 11, 1911, L. B. Moseley, Clerk.

205 *Waiver of Service of Citation.*

In the Supreme Court of the United States.

No. 76.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI et als.
v.
L. & N. RAILROAD COMPANY.

We hereby waive the service of citation on appeal of the above styled cause, from the Southern Division of the Southern District of Mississippi, to the Supreme Court of the United States, being No. 76 on the Docket of said Circuit Court and enter appearance in said cause, with the same effect as if duly served with citation therein.

GREGORY L. SMITH,
Mobile, Ala.;
MARCELLUS GREEN,
GARNER WYNN GREEN,
Jackson, Miss.,
Solicitors for L. & N. R. R. Co.

Endorsed: Filed November 20th, 1911. L. B. Moseley, Clerk.

206 In the Circuit Court of the United States for the Southern District of Mississippi.

I, L. B. Moseley, Clerk of the Circuit Court of the United States for the Southern District of Mississippi do hereby certify that the foregoing two hundred and five pages contain a true and correct transcript of the record in the case of the Louisville & Nashville Railroad Co. vs. The Mississippi Railroad Commission et al., numbered 76 as appears of record in my office at Jackson, Mississippi.

Witness my hand and official seal hereto affixed this 2nd day of December, A. D. 1911.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk U. S. Circuit Court.

207 In the Supreme Court of the United States.

No. 76.

MISSISSIPPI RAILROAD COMMISSION et als.
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Specifications of Error.

Now comes S. S. Hudson, Attorney General of the State of Mississippi, and for the Mississippi Railroad Commission, and specifies to this court that the Circuit Federal Court of the Southern District of the State of Mississippi, in deciding this case, committed the error in overruling the demurrer found on page 64, paragraphs one and two, of the Record.

First. Because the Federal Court was without jurisdiction in this case for the reason that the bill of complaint shows on its face that the complainant, the Louisville and Nashville Railroad Company, is a Mississippi corporation, and that the defendants are also citizens of Mississippi, and that therefore there is no diversity of citizenship between the parties such as would give the Federal Court jurisdiction of the case.

The bill of complaint shows on its face that by the Act of the Legislature of the State of Mississippi, approved February 7, 1867, the New Orleans, Mobile and Chattanooga Railroad Company, a corporation organized under and created by the laws of the State of Alabama, was recognized, re-enacted, and approved as a body politic and corporate with all the powers, rights, and privileges and franchises granted to it by said State of Alabama in and by its act of incorporation; and all of the provisions of the Act of Incorporation granted to said company by the Legislature of Alabama, were, by the Act of the Legislature of the State of Mississippi, above referred to, re-incorporated, re-adopted, re-confirmed, and re-approved by the Legislature of the State of Mississippi so far as the same were applicable to the State of Mississippi; and the said Company was vested through the Legislature of the State of Mississippi, with the powers, rights, privileges, and franchises granted to it in said Act of Incorporation, and was empowered by said Legislature, and authorized to exercise and enjoy the same in the State of Mississippi by the Legislature of said State, and to do and exercise and enjoy all the rights, powers, and privileges granted to any other domestic corporation, and secured by the Act of its Incorporation, and necessary to secure, obtain, and accomplish its objects and purposes.

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The bill further shows on its face that by a certain Act of the Legislature of Mississippi of 1882, it was provided, among other things, in substance, that when any railroad shall be sold under execution or under a deed of trust, or by a decree of the court enforcing a mortgage or other lien, the purchaser- thereof, and their

assigns and successors, shall be entitled to and invested with all the franchises, rights, powers, and immunities appertaining to or possessed by the corporation or company whose property and franchises were sold; and the bill shows on its face that the provisions of said Act of 1882, with some modifications thereto, now constitute Section 4065, of the Code of Mississippi of 1906, and these sections of the Code of 1882 and Section 4065 were employed to that extent by which the Louisville and Nashville Railroad Company became the owner of the rights and franchises of the aforesaid New Orleans, Mobile, and Chattanooga Railroad Company, subject to the laws then in force of the State of Mississippi.

The bill further shows on its face that all the property and franchises of the said New Orleans, Mobile, and Chattanooga Railroad Company, were sold to satisfy a certain mortgage in accordance with the Acts of 1882, and that complainant became the purchaser thereof on October 5th, 1883; and that complainant has the right and power to exercise all of the rights and powers conferred upon it and its predecessors, by the Mississippi Legislature as a Mississippi corporation.

And, because, the bill shows on its face that the Federal Court is without jurisdiction, and could not hear and determine the issues raised by the said bill of complaint because the Louisville and Nashville Railroad is a Mississippi Corporation, and the Acts of 1908, which prevent the removal of causes of foreign corporations to the Federal Court, had no reference and application to the said Louisville and Nashville Railroad Company, which is a domestic
209 corporation; and because the Act of 1908, referred to in said Bill of complaint, enacted by the Mississippi Legislature is unconstitutional and void, and in contravention of the Federal Constitution.

And therefore the court should have sustained the demurrer according to the bill of complaint, and dismissed the same and decreed for the Railroad Commission et al. in said cause.

S. S. HUDSON,
Attorney General, State of Mississippi.

We have received a copy of the Specifications of error, and waive service of the same on us.

—— ——.
—— ——.

210 [Endorsed:] No. —. In Supreme Court of Mississippi. —— ——, Appellant, vs. The State. Brief for the State, Appellee. Filed — ——, 190–. —— ——, Clerk. By —— ——, Deputy Clerk. —— ——, Attorney-General.

211 In the Supreme Court of the United States on Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of Mississippi.

No. —.

MISSISSIPPI RAILROAD COMMISSION ET ALS.
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Agreement as to Printing the Record.

It is agreed by S. S. Hudson, Attorney General of Mississippi, and Solicitor for the Mississippi Railroad Commission, and all parties appellant in the above styled case, and Gregory L. Smith, and Marcellus Green, and Garner Wynn Green, Solicitors for the Louisville and Nashville Railroad Company, that only these parts of the Record need be printed, as no exception is taken to the decision of the court on the merits, viz: 1. Caption; 2. Original bill; and exhibits; 3. Restraining order and marshal's return; 4. Supplemental bill; 5. Partial demurrer of defendants; 6. Answer of defendants; 7. Replication of plaintiff; 8. Agreement as to hearing; 9. Final Decree; 10. Final decree amended; 11. Petition for appeal; 12. Bond for appeal; 13. Waiver of citation.

S. S. HUDSON,
Attorney General of Mississippi and Solicitor for Appellants.
GREGORY L. SMITH,
MARCELLUS GREEN,
GARNER WYNN GREEN,
Solicitors for Appellee, The Louisville and Nashville Railroad Company.

212 [Endorsed:] File No. 22,979. Supreme Court U. S. October Term, 1911. Term No. 903. The Railroad Commission of the State of Mississippi et al., App'ts, vs. Louisville & Nashville Railroad Co. Stipulation as to parts of record to be printed. Filed Dec. 26th, 1911.

Endorsed on cover: File No. 22,979. S. Mississippi C. C. U. S. Term No. 903. The Railroad Commission of the State of Mississippi et al., appellants, vs. Louisville & Nashville Railroad Company. Filed December 26th, 1911. File No. 22,979.

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Supreme Court of the United States

OCTOBER TERM, 1911.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellee.

No. 903.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANTS.

CLAUDE CLAYTON,
Assistant Attorney-General of the State of Mississippi,
HANNIS TAYLOR,
WILLIAM D. ANDERSON,
Counsel for Appellants.

PRESS OF GIBSON BROTHERS
WASHINGTON, D. C.
1912

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Supreme Court of the United States

OCTOBER TERM, 1911.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL., *Appellants*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The statement of this case and brief filed by former Attorney-General Hudson was withdrawn by the present Attorney-General on the 29th day of January, 1912.

This is a bill in equity by the Louisville and Nashville Railroad Company, the appellee, hereinafter designated as Railroad Company, brought in the Circuit Court of the United States for the Southern Division of Mississippi against the Railroad Commission and the Attorney-Gen-

eral of the State of Mississippi and the District Attorney of the State for the Southern District of Mississippi through which the railroad runs; appellants hereinafter designated as Railroad Commission. The purpose of the bill was to enjoin the Railroad Commission and the other officers of the State of Mississippi above named, from enforcing or attempting to enforce a statute of the State of Mississippi, approved March 20, 1908, entitled "An Act Prescribing the Terms and Conditions on Which Foreign Public Service Corporations Shall Engage in Business in this State, and Fixing Penalties for Violation of Same" (R., pp. 9–10). The Railroad Commission interposed a demurrer to the bill which was by the Court below overruled. Thereupon the Railroad Commission answered the bill and the cause was tried on its merits and a decree rendered in favor of the Railroad Company, from which decree the Railroad Commission prosecutes this appeal.

This litigation arose in the following manner. The Railroad Commission made an order requiring the Railroad Company, in addition to stopping certain of its passenger trains at its depot in Bay Saint Louis, Mississippi, to also stop them at Front Street crossing in said city. The Railroad Company refused to obey this order, and thereupon the Attorney-General of the State, on the relation of the Railroad Commission, filed a bill in the Chancery Court of Hancock Couty to enjoin the Railroad Company from further disobeying this order of the Railroad Commission. By petition and bond the Railroad Company removed this cause to the Circuit Court of the United States for the Southern District of Mississippi, setting up in its petition for removal that it was a non-resident corporation of the State of Mississippi, being a citizen of the State of Kentucky, where it was incorporated (R., pp. 23–30).

Immediately upon the removal of that cause to the Federal Court, the Attorney-General of Mississippi, conceiving that the Railroad Company by such removal had violated the "anti-removal statute" of the State, approved, March 20, 1908, above referred to, which is copied in the Record (pages 9 and 10), instituted a suit in the Chancery Court of Harrison County through which the Railroad Company runs, setting up that by such removal of said cause to the Federal Court the Railroad Company had violated this statute and thereby forfeited its right to do an intra-state business in Mississippi and subjected itself to the penalties denounced by the statute. The prayer of the bill was to oust the Railroad Company from further engaging in intra-state commerce within Mississippi and to recover penalties provided by the statute (R., pp. 31–32). The Railroad Company demurred to that bill, which demurrer the Chancery Court of Harrison County sustained, and from the decree sustaining the demurrer the cause was appealed to the Supreme Court of Mississippi where the decree of the Court below was reversed and the cause remanded. The cause was then tried in the Chancery Court on its merits and is now again in the Supreme Court of Mississippi by appeal. On the first appeal to the Supreme Court of Mississippi the constitutionality of the statute in question was upheld in two opinions, one on the original hearing, and the other on suggestion of error, which will be found reported in 97 Mississippi, 35 (51 South., 918; 53 South., 454). That is the cause instituted by the State in which it seeks to uphold the constitutionality of the statute in question and which eventually by proper proceeding will reach the Supreme Court of the United States.

Immediately after the institution of the cause reported in 97 Mississippi *supra*, the Railroad Company, proceed-

ing on the idea that the Chancery Court of the State had no jurisdiction of that cause, and therefore the State would fail therein, brought the bill in this case in the Circuit Court of the United States for the Southern District of Mississippi, setting up the want of jurisdiction and further that the "anti-removal statute" in question was violative of the Constitution of the United States, making the Railroad Commission, the Attorney-General of the State, and the District Attorney of the Southern District of the State parties against whom an injunction was prayed, preventing them from attempting by any proceeding in the Courts of Mississippi, other than the cause pending in the Chancery Court of Harrison County above referred to, to enforce said statute. This is the cause now before this Court (R., pp. 1–15). The Railroad Commission demurred to the bill on the ground of the want of jurisdiction in the Federal Court, the basis of the demurrer being that the Railroad Company was a domestic corporation of Mississippi and therefore a citizen of Mississippi and without the right to sue in the Federal Court. The Court below overruled the demurrer, and as stated above, the Railroad Commission answered the bill and there was decree on the merits in favor of the Railroad Company (Final Decree, R., pp. 48–49).

The jurisdiction of the Federal Court of this cause is assailed in the record on another ground. It is shown by the bill that when this cause was instituted the case of the State of Mississippi on the relation of the Attorney-General against the Railroad Company involving the constitutionality of this "anti-removal statute," had been brought and was pending in the Chancery Court of Harrison County, the subject-matter of the two suits being the same and the parties in interest the same.

As pertinent to the question whether the Railroad Com-

pany was a citizen of the State of Mississippi the following allegations of the bill in this cause are referred to, paragraph third, in this language (R., p. 2):

> "The railroad so owned and operated by complainant in the State of Mississippi extends from the city of Mobile, through the counties of Jackson, Harrison and Hancock, in the State of Mississippi, to the city of New Orleans in the State of Louisiana, and was originally built by a corporation created by and organized under the laws of the State of Alabama under the name of the New Orleans, Mobile and Chattanooga Railroad Company. The name of said corporation was subsequently changed by an act of the legislature of the State of Alabama to the New Orleans, Mobile and Texas Railroad Company. The said company mortgaged its property and franchises, and made default under the terms of its said mortgage; its property and franchises were foreclosed and sold to satisfy said mortgage, and the purchasers at said sale organized a new corporation under the name of the New Orleans, Mobile and Texas Railroad Company, as re-organized, and thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and description, except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and interstate freight and passengers as aforesaid."

It is further averred (R., pp. 3–4) that by an act of the legislature of Mississippi, approved February 7, 1867, the New Orleans, Mobile and Chattanooga Railroad Company

> "as a corporation organized under and created by the laws of the State of Alabama, was recognized and approved as a body politic and corporate, with all of the powers, privileges, rights and franchises granted to it by said State of Alabama in and by its Act of Incorporation. All of the provisions of the act of

incorporation granted to said company by the legislature of Alabama were, by said act of the legislature of the State of Mississippi, adopted, confirmed and approved, so far as the same were applicable to the State of Mississippi, and said company was vested with the powers, privileges and franchises granted to it in said act of incorporation, and was empowered and authorized to exercise and enjoy the same in the State of Mississippi, and to do and exercise and enjoy all the rights, powers, privileges and franchises pertaining to corporate bodies within said State necessary for the full enjoyment and exercise of the rights, powers, privileges and franchises granted and secured to it by the act of its incorporation and necessary to secure, obtain and accomplish the objects and purposes of its incorporation in the same manner and with like powers and effect as if said company had been incorporated by virtue of a grant or law of the State of Mississippi."

(The Act of the legislature of Mississippi, February 7, 1867, R., pp. 15–23.)

In paragraph seven of the bill there is this averment:

"In addition to the said charter rights so conferred upon the complainant by the legislature of the State of Mississippi, the said State of Mississippi, by an act of its legislature, adopted in 1882, provided, among other things and in substance that when any railroad shall be sold under execution or under a deed of trust, or by a decree of a court enforcing a mortgage or other lien, the purchaser thereof, and their assigns and successors, shall be entitled to and be invested with all the franchises, rights, powers, privileges and immunities appertaining to or possessed by the company or corporation whose property and franchises were sold. The provisions of said act with some modifications thereof now constitute Section 4065 of the Code of Mississippi of 1906" (R., p. 6).

The Act of the legislature of Mississippi, approved March 8, 1882, referred to in paragraph seven of the bill (Mississippi Laws, 1882, page 47, chapter 25), is as follows:

"An Act to authorize purchasers of railroads under execution or decrees of foreclosure, to organize as incorporated companies, and for other purposes.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That any railroad company or other incorporated company, created by the laws of this State, or created in pursuance of the laws of this State, which has heretofore or may hereafter mortgage its property and franchises, and which property and franchises shall have heretofore been or may hereafter be sold for foreclosure of such mortgage by order or decree of any court of this State, or of the United States, having jurisdiction thereof; or which franchises or property may be sold under execution under the provisions of Section 1038 of the Code of 1880, the purchasers thereof, and their assigns and successors shall be entitled to, and be invested with all the franchises, rights, powers, privileges and immunities appertaining to, and possessed by the company or corporation whose property and franchises are thus sold, in as full and complete a manner as the said company or corporation is or was possessed by virtue of its charter and amendments thereto, or by virtue of any other law, or laws of this State; provided, that no mortgage executed by the corporation organized under this act, shall protect its property from the collection of claims for damages done by its engines and cars, to the persons or property of citizens of this State; and also provided, that no exemption from taxation which may be contained in said charters and amendments shall be construed to continue for a longer period than twenty years from the date of said filing, and in no event beyond twenty years.

SEC. 2. Be it further enacted, That the aforesaid purchasers and their assigns may meet and organize themselves into *a new corporation*, by such name as

they may choose to adopt; fix the amount of the entire capital stock of the *new corporation*, and also the capital stock representing the property bought; divide the same into shares of one hundred dollars each, and elect a board of directors of such number as they may see fit, and said board may elect a president and such other officers as they may deem expedient, fix their duties, terms of office, and compensation, *and adopt by-laws not inconsistent with the laws of this State.*

SEC. 3. Be it further enacted, That upon the organization being effected as aforesaid, and upon the board of directors filing with the Secretary of State a statement signed by the members of said board, showing the name of the corporation so organized, the date of the organization, the amount of the entire capital stock, the amount of the capital stock representing the property so purchased, the shares into which divided, the situation or location of the property purchased, the name or names by which the corporation or corporations of which it is the successor were chartered and known, the Secretary of State shall file and record said statement, and certify the fact of such filing and recording under the great seal of the State, and thereupon the company so organized *shall be a body corporate, with all the franchises, rights, powers, privileges and immunities, granted to the company or companies whose property and franchises were sold and bought as aforesaid, in as full and complete a manner as if* THE NEW COMPANY WERE GRANTED A NEW CHARTER OF INCORPORATION *in the very words of the acts of incorporation and amendments thereto under which the original company or companies existed.*

Sec. 4. Be it further enacted, That said *new company may*, at any time thereafter, amend its charter in respect to change of name, number of directors, and amount of capital stock, by a vote of two-thirds of the capital stock subscribed, voting in favor thereof at a special meeting of the stockholders to be called for the purpose, and such amendments shall take effect

> from the date of filing a statement of the same, certified by the board of directors, in the office of the Secretary of State, there to be recorded as the original statement or articles of incorporation were recorded."

Thus, upon the facts presented upon the face of the bill filed by appellee in this case, a twofold question of jurisdiction arises. In its first aspect, the question of jurisdiction depends upon appellants' contention that the Railroad Company in question is a domestic corporation of the State of Mississippi. In its second aspect, the question of jurisdiction depends upon appellants' contention that as the said Chancery Court of Harrison County was in full and lawful possession of this case before the pending bill was filed in the Circuit Court of the United States for the Southern District of Mississippi, a court of concurrent jurisdiction, the said Chancery Court of Harrison County has the legal right to "retain it exclusively and will be left to determine the controversy, to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case. It therefore follows that such jurisdiction or right cannot be diverted or arrested by subsequent proceedings instituted in another court" (10 Cyc., 1003–1004).

I.

The Corporation in Question is a Domestic Corporation of the State of Mississippi.

That conclusion of law will be predicated solely upon the allegations made upon the face of the bill filed by appellee in this case. The demurrer admits only such facts as are well pleaded; it does not admit erroneous conclusions of law drawn by appellee from such facts. This Court must draw the correct conclusions of law from

the facts well pleaded. In the first place the bill exhibits the act of February 7, 1867, by which the legislature of Mississippi incorporated the New Orleans, Mobile and Chattanooga Railroad Company, after a prior incorporation by the legislature of Alabama. By the terms of that act it is provided that:

> "The said Company is hereby invested with the powers, privileges and franchises granted to it, in its said act of incorporation, and is empowered and authorized to exercise and enjoy the same in this State, and to have, exercise and enjoy all the rights, powers and privileges and franchises pertaining to corporate bodies within this State, necessary for the full enjoyment and exercise of the said rights, powers, privileges and franchises, granted and secured to it, by its said act of incorporation, and necessary to secure attain and accomplish the objects and purposes of its incorporation *in the same manner and with like power and effect as if said Company had been incorporated by virtue of any grant or law of this State, subject only to the conditions, provisions and restrictions of this act, as hereinafter set forth and the general laws of this State.*"

This Court must determine as a matter of law whether or no, *by reason of the particular language used in that act*, there was a separate original Mississippi corporation formed, despite the fact of a prior incorporation in Alabama. In Memphis and Charleston R. R. Co. *v.* Alabama, 107 U. S., 581, this Court held that the Memphis and Charleston Railroad Company is made by the statutes of Alabama, an Alabama corporation; and, although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama. This Court reached that conclusion because *an inspection of the terms of the Alabama legislation* convinced it that it was

the intention of the legislature of that State to create a distinct corporate entity within its limits. This Court therefore held in that case that—

> "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State, and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States (R. R. Co. v. Miller, 1 Black., 286; R. Co. v. Whitton, 13 Wall., 270, 283.)"

Our earnest contention is that if this Court will apply the same rule of construction to the particular language used in the said act of February 7, 1867, it will be driven to the conclusion that it was the purpose of the State of Mississippi to create a separate original Mississippi corporation. There can be no question of its sovereign power to create such a separate original corporation, if it so desired. It is purely a question of legislative intent to be drawn from the terms of the particular act taken as a whole. If the intent to create such a separate original corporation appears from the terms of the voluminous act of February 7, 1867 (R., pp. 15–23), then Penn. R. R. Co. v. St. Louis R. R. Co., 118 U. S., 290; St. Louis & San Francisco R. R. Co. v. James, 161 U. S., 545; Louisville, etc. Ry. Co. v. Louisville Trust Co., 174 U. S., 561; Southern Ry. Co. v. Allison, 190 U. S., 337, have no application whatever. In those cases it is admitted that it was simply the purpose of one State to authorize a railroad corporation of another State to extend and operate its road within the former without being thereby constituted either a corporation or a citizen of the latter. If the legis-

lature of the State of Mississippi had intended to do no more than grant such a license as that why did it enact the very elaborate scheme of incorporation contained in the fourteen sections of the act of February 7, 1867, which occupies nine pages (15–23) of the record? If the Court will examine as a whole the provisions of that very elaborate act, it will be convinced, as it was in Memphis and Charleston R. R. Co. *v.* Alabama, *that it was the intention of the legislature of Mississippi to create a separate original Mississippi corporation.* If that intention appears from all the terms of the act taken as a whole, then there is an end of the question.

No matter what conclusion the Court may reach as to the legal effect of the act of February 7, 1867, it will find no room to doubt that an original and distinct Mississippi corporation was created by the act approved March 8, 1882. The bill filed by the appellee in this case avers that—

> "under said several acts of the legislature of the States of Alabama, Mississippi and Louisiana, and under said act of Congress, approved March 2, 1868, and upon the faith thereof, the said New Orleans, Mobile and Chattanooga Railroad Company constructed said railroad from the city of Mobile, through the State of Mississippi, to the city of New Orleans, in the State of Louisiana, and expended therein large sums of money and thereafter mortgaged *its property and franchises*, as it was authorized to do under said several acts of the legislature of said several states. Said mortgage was subsequently foreclosed, and the said *property and franchises* sold, and the purchasers thereof, on October 5, 1881, sold and conveyed said *property and franchises* to complainant who purchased the same upon the faith of the said several acts of the legislature of the said several States, and has ever since owned and operated said railroad as a common

carrier of interstate and intrastate freight and passengers as hereinbefore alleged."

By what authority and by what process was a new corporation created in the State of Mississippi, after the annihilation of the old one created by the act of February 7, 1867? The bill answers that question by averring that a new corporation was created in—

> "the said State of Mississippi, by an act of its legislature, adopted in 1882, provided among other things in substance that when any railroad shall be sold under execution or under a deed of trust, or by a decree of a court enforcing a mortgage or other lien, the purchasers thereof, and their assigns and successors, shall be entitled to and be invested with all the franchises, rights, powers, privileges and immunities appertaining to or possessed by the company or corporation whose property and franchises were sold. The provisions of said act with some modifications thereof now constitute Section 4065 of the Code of Mississippi of 1906."

When the Court examines this act of March 8, 1882, heretofore set out—by virtue of which an original and distinct Mississippi corporation was created, after the foreclosure sale—it will find it entitled "An Act to authorize purchasers of railroads under execution or decrees of foreclosure, to organize as incorporated companies, and for other purposes." Here was a special act devised by the State of Mississippi to meet a special condition; and it is admitted by the bill that, under the special terms of that act, a new corporation came into existence. *It is that new creation that now stands before this Court, for the conclusive reason that it is not and cannot be contended that any other corporation was ever created subsequent to that created by the special act of 1882.* Was that new creation under the act

of 1882 a domestic Mississippi corporation? The question is answered conclusively by *the terms of the act itself, which provides:*

> "SECTION 1. Be it enacted by the legislature of the State of Mississippi, That any railroad company or other incorporate company, *created by the laws of this State, or created in pursuance of the laws of this State,* which has heretofore or may hereafter mortgage its property and franchises, and which property and franchises, shall have heretofore been or may hereafter be sold for foreclosure of such mortgage by order or decree of any court of this State, or of the United States, having jurisdiction thereof; or which franchises or property may be sold under execution under the provisions of Section 1038 of the Code of 1880, the purchasers thereof, and their assigns and successors, shall be entitled to, and be invested with all the franchises, rights, powers, privileges and immunities appertaining to, and possessed by the company or corporation whose property and franchises are thus sold, in as full and complete a manner as the said company or corporation is or was possessed by virtue of its charter and amendments thereto * * * .
>
> "SEC. 2. Be it further enacted, That the aforesaid purchasers and their assigns may meet and organize themselves into A NEW CORPORATION, by such name as they may choose to adopt; fix the amount of the entire capital stock of the NEW CORPORATION, and also the capital stock representing the property brought; divide the same into shares of one hundred dollars each, and elect a board of directors of such number as they may see fit, and said board may elect a president and such other officers as they may deem expedient, fix their duties, terms of office, and compensation, *and adopt by-laws not inconsistent with the laws of this State.*
>
> "SEC. 3. Be it further enacted, That upon the organization being effected as aforesaid, and upon the board of directors filing with the Secretary of

State a statement signed by the members of said board showing the name of the corporation so organized, the date of the organization, the amount of the entire capital stock, the amount of the capital stock representing the property so purchased, the shares into which divided, the situation or location of the property purchased, the name or names by which the corporation or corporations it is the successor, were chartered and known, the Secretary of State shall file and record said statement, and certify the fact of such filing and recording under the great seal of the State, and thereupon the company so organized, *shall be a body corporate, with all the franchises, rights, powers, privileges and immunities, granted to the company or companies whose property and franchises were sold and bought as aforesaid, in as full and complete a manner as if* THE NEW COMPANY *were granted* A NEW CHARTER *of incorporation in the very words of the acts of incorporation and amendments thereto under which the original company or companies existed.*"

Here the declaration is made, with all the precision and clearness of which the language is capable, that the "body corporate," which arises under this special incorporation law devised for the benefit of purchasers at a foreclosure sale of railroad property within the State of Mississippi, is a "*new corporation*," whose entire machinery and internal organization as to stock, board of directors, and other officers, *is the creation of the special law in question alone.* Such "*new corporation*" cannot, by possibility, have any connection whatever with any preexisting corporate body deriving its right to exist from some other State. Under that special act of 1882 the corporation in question, now operating the railroad in question within the limits of the State of Mississippi, exists—upon that special act alone its corporate existence depends. How then is it pos-

sible to deny under the allegations made in this bill, that it is an original and distinct domestic corporation of the State of Mississippi. The terms of this special incorporation act of 1882 satisfy every requirement prescribed by this Court in Memphis and Charleston R. R. Co. *v.* Alabama, 107 U. S., 585, for the creation of an original and distinct corporation.

If any doubt remains as to the contention just made it should be removed by the judgment of this Court in Clark *v.* Barnard, 108 U. S., 436, in which it was held that—

> "A railroad corporation of one State which purchases the franchises and railroad of another corporation situated in another State, *and is authorized by a statute of the latter State*, to have, use and enjoy all the rights, privileges and powers possessed, and is made subject to all the duties and liabilities imposed upon the latter corporation, *becomes, in respect to its railroad in such other State, a corporation* IN AND FOR THAT STATE."

The facts in the case cited are the same, in every vital particular, as the facts of this case. In stating the facts of the case cited Mr. Justice Matthews said:

> "The Boston, Hartford and Erie Railroad company was originally created a corporation by the laws of Connecticut. Its charter conferred authority upon it in these terms * * *: 'In pursuance of this authority the Boston, Hartford and Erie Railroad Company purchased the franchises and railroad of the Hartford, Providence and Fishkill Railroad Company. This latter company was a consolidated corporation, deriving its existence and powers from the laws both of Connecticut and Rhode Island, whose road, as defined in the acts of incorporation, constituted a line within the general description contained in the section from the charter of the Boston, Hartford

and Erie Railroad Company, already quoted. By a subsequent act of the legislature of Rhode Island, the sale and transfer of the Hartford, Providence and Fishkill Railroad, its property and franchises, to the Boston, Hartford and Erie Railroad Company was ratified and conformed, so far as said railroad was situated in that State; and it was thereupon further enacted, that the 'Said Boston, Hartford and Erie Railroad Company, by that name, shall and may have use, exercise and enjoy all the rights, privileges and powers heretofore granted and belonging to said Hartford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State."

Upon that state of facts, *identical in all vital particulars with the facts presented here*, this Court held that

> "The Hartford, Providence and Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford and Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, *and became, therefore, in respect to its railroad in Rhode Island, a* CORPORATION IN AND OF THAT STATE. * * * The same association of natural persons would thus be *constituted two district corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership.* Such was in in fact the case in regard to this company, so that in Rhode Island *it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize.*"

That covers the vital contention involved here. As the Louisville and Nashville R. R. Company, a corporation

of the State of Kentucky, has acquired, through a "sale and transfer" the right to operate a "new corporation" created by the State of Mississippi under a special incorporation law, *imposing special liabilities and duties*, it has become, in respect to its railroad in Mississippi, *"a corporation in and of that State."* In that way—

> "The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common as to name, capital or membership."

The able and experienced counsel for appellee, foreseeing the force of the argument just made—based as it is upon a leading case that has never been questioned—have attempted to counteract it, on page 8 of their brief, by a suggestion that should not have been made. It is there vaguely intimated that the new incorporation of the purchasers of the old company, *after the foreclosure sale*, might have been by virtue of the general incorporation laws of Alabama. That suggestion must have been made in momentary forgetfulness of the facts alleged in paragraph 7 of their bill, from which it clearly appears *that such new incorporation was by virtue of the Mississippi statute of 1882 heretofore referred to.* In our assignment of errors (R., p. 53) this occurs:

> *"The bill further shows on its face* that all the property and franchises of the said New Orleans, Mobile and Chattanooga Railroad Company were sold to satisfy a certain mortgage in accordance with the Acts of 1882, *and that complainant became the purchaser thereof on October 5, 1883; and that complainant has the right and power to exercise all of the rights and powers conferred upon it and its predecessors,*

by the Mississippi legislature as a Mississippi corporation."

In precisely the same way the Boston, Hartford and Erie Railroad Company acquired the Hartford, Providence and Fishkill Railroad in Rhode Island where it—

> "became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, *in respect to its railroad in Rhode Island, a corporation in and of that State.*"

The authority of Clark *v.* Barnard is conclusive of this branch of the case.

Having demonstrated, *as a matter of law*, upon the facts as stated on the face of appellee's bill, that the corporation in question is a domestic corporation of the State of Mississippi, we do not consider it necessary to make any further answer to appellee's contention that the Circuit Court's jurisdiction can be upheld upon an independent constitutional ground, admitting that all parties are citizens of Mississippi.

No support can be drawn by appellee from the case of Pacific Electric Co. *v.* Los Angeles, 194 U. S., 112, in which the jurisdiction was upheld because a case was made of an actual violation of the obligation of contract clause of the Constitution. The violation of the contract clause was actually adjudicated in that case and relief given against an ordinance "in so far as it may be construed to interfere with the complainant in the construction, operation, and maintenance of its street car system in the city of Indianapolis." There is no federal question stated in the bill in this case—the jurisdiction depends upon diverse citizenship alone.

II.

The Prior Lawful Possession of this Case by the Chancery Court of Harrison County Confers Exclusive Jurisdiction upon that Court until it is There Ended.

The bill in this case expressly avers that prior to its filing the suit of "The State of Mississippi *v.* Louisville and Nashville Railroad Company" had been begun in the Chancery Court of Harrison County. In the twelfth paragraph of the bill (R., pp. 11–12):

> "Complainant further shows to the Court that the said defendant R. V. Fletcher, Attorney-General of the State of Mississippi, on the 18th day of August, 1908, attempted to institute in the Chancery Court of Harrison County a statutory proceeding in the nature of *quo warranto* proceedings, to oust complainant of its right to do an intrastate common carrier business in the State of Mississippi, and to recover of complainant, the said Louisville and Nashville Railroad Company, penalties for continuing to do such business in the State of Mississippi, after complainant had removed the case of the State of Mississippi, at the relation of the Mississippi Railroad Commission, and others, against it, as hereinbefore alleged from the Chancery Court of Hancock County to the United States Circuit Court for the Southern Division of the Southern District of Mississippi, and for that purpose filed in said Chancery Court of Hancock County an information. *A copy of said information so filed in the Chancery Court of Harrison County is hereto attached and made part thereof.*"

The record of said Chancery Court of Harrison County, thus made a part of this bill, is printed in this record on

pages 31 and 32. In the final decree rendered in this cause October 28, 1911, the pendency of such bill of complainant is recognized in these terms:

> "Other than the proceedings now pending in the Chancery Court of Harrison County, State of Mississippi, as stated on the docket of said Court, 'The State of Mississippi *v.* Louisville and Nashville Railroad Company.'"

And yet, despite the facts thus exhibited by appellee upon the face of its bill; despite the fact that appellants demurred to that bill upon the ground that the Circuit Court had no jurisdiction of the case stated by it, the very narrow and technical objection is now made that this Court cannot consider this phase of the question of the jurisdiction of the Circuit Court because of some fancied defect in the assignment of error. The short answer is that, *as to a lack of jurisdiction in the inferior court apparent upon the face of the record*, no assignment of error is necessary at all. It is the settled rule of this Court that, even when no motion is made by either party, in cases coming from an inferior court to this Court, it will, on its own motion, reverse a judgment for want of jurisdiction in the court below, not only in cases where it is shown negatively that jurisdiction does not exist, but even when it appears affirmatively that it does exist. (Mansfield, C. & L. M. R. Co. *v.* Swan, 111 U. S., 379; Börs *v.* Preston, 111 U. S., 252; Mordecai *v.* Lindsay, 19 How., 199; Hancock *v.* Holbrook, 112 U. S., 231; Neel *v.* Penn. Co., 157 U. S., 154; Metcalf *v.* Watertown, 128 U. S., 587; Parker *v.* Ormsby, 141 U. S., 83.) It has been held that this Court may of its own motion give counsel an opportunity, after argument, to file printed briefs on a plea to the jurisdiction, which was overruled by the Cir-

cuit Court, although no error was assigned to such ruling, and the question was not referred to on the argument of the cause. (Penn. R. Co. *v.* St. Louis, A. & T. H. R. Co., 116 U. S., 472; Penn. R. Co. *v.* Same, 118 U. S., 290.) Even when the parties fail to raise the question, or consent that the case may be considered on its merits, this Court must examine and determine whether a Circuit Court of the United States has or has not jurisdiction in the case it is called upon to decide. (Cameron *v.* Hodges, 127 U. S., 322; Hegler *v.* Faulkner, 127 U. S., 482.) Will it be contended in the face of these authorities that this Court must not and cannot inquire whether or no the Circuit Court was forbidden to assume jurisdiction of this case, knowing as it did that a State Court of concurrent jurisdiction had already assumed jurisdiction of it?

The settled rule of this Court was thus restated in Harkrader *v.* Wadley, 172 U. S., 164:

> "When a State Court and a Court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. (Freeman *v.* Howe, 24 How., 450; Buck *v.* Colbath, 3 Wall., 334; Taylor *v.* Taintor, 16 Wall., 366; *Ex parte* Crouch, 112 U. S., 178.)"

See also Prout *v.* Starr, 188 U. S., 537. The entire subject was ably reviewed by Fuller, C. J., sitting as Circuit Justice in Westfeldt *v.* North Carolina Mining Co., 166 Fed., 706. It was therein held that where the same subject-matter was involved in an action at law in a State Court a subsequent bill in equity could not be filed by one of the parties in the Circuit Court of the United States "on the same facts and for the same relief, under the rule that in

matters of concurrent jurisdiction the Court to which jurisdiction first attaches retains it until final determination." That opinion was approved by this Court in North Carolina Mining Co. *v.* Westfeldt, 215 U. S., 586. In the recent case of Rickey Land & C. Co. *v.* Miller & Lux, 218 U. S., 258, it was held that—

> "The Federal Circuit Court for the district of Nevada and the California state courts have concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate, as against each other, the waters of an interstate stream; and whichever court first acquires jurisdiction is entitled to proceed to final determination without interference from the other."

The rule laid down in the foregoing cases is neither narrow nor technical. It only requires that the subject-matter, and the parties or privies involved in the two suits shall be substantially the same, and the purposes of the suits substantially the same. See Watson *v.* Jones, 13 Wall., 679.

Appellee is making a vain attempt, by entirely unsubstantial refinements, to take this case out of the operation of the broad and rational rule in question by the contention that there is not a substantial identity of the above stated elements between the suit in the Chancery Court of Harrison County and the suit in the Circuit Court of the United States. Not only is that contention entirely unsupported by the cases cited, but it is actually broken down by the admission on page 26 of the brief that "It may be that if the State is successful in the Harrison County case, the judgment in the case at bar will be fruitless." That is perfectly true, because the two suits are between substantially the same parties, as to the same

subject-matter and for the same purpose. The rule of law involved has been admirably stated in this wise by Brannon, *The Fourteenth Amendment*, p. 427:

> "COURT FIRST IN POSSESSION OF CASE—Suppose a State court has lawful possession of a case, and the party takes a notion that he prefers the federal forum. Though it is a case which might have been originally brought in a federal court, yet having begun in a State court, that court has a right to finish it, because of the rule that between courts of concurrent jurisdiction the court which first obtains possession of a case retains it to the end. (Ward *v.* Todd, 103 U. S., 327; Central Nat. Bank *v.* Stevens, 169 U. S., 432, 459; Harkrader *v.* Wadley, 172 U. S., 148; Parsons *v.* Snider, 42 W. Va., 517; Oliver *v.* Parlin & Orendorf Co., 105 Fed., 272.) So the party must remove his case *or let it go on to final judgment in the State court, and to the highest State court by appeal, and then go to the United States Supreme Court by appeal. He cannot, while his suit is pending in the State court, sue in in the United States Circuit Court.*"

That is the precise situation of this matter. The prior case, begun in the Chancery Court of Harrison County on August 18, 1908, has been thoroughly litigated there, and in the Supreme Court of the State of Mississippi, where it is now pending. It will certainly find its way to this Court in a short time. Then the grave constitutional question presented by the act of March 20, 1908, can be properly argued here. That constitutional question is not before this Court in this case. Both sides agree in the opinion, that this case presents simply the jurisdiction of the Circuit Court over the case made by the bill as set forth in this record. If, however, the Court should be of the opinion that the constitutionality of the act of March 20, 1908, is before this Court in this case, we pray that this

motion be continued to the hearing so that the constitutionality of said act, twice affirmed by the Supreme Court of Mississippi, may be argued.

III.

Question of Jurisdiction Certified by the Terms of the Final Decree.

On page 12 of appellee's brief the following occurs:

> "The appeal in this case should be dismissed because *the jurisdiction of the Circuit Court is the sole question raised*, and such question has not been certified by the Circuit Court to this Court. Maynard *v.* Hecht, 151 U. S., 324; Colvin *v.* Jacksonville, 157 U. S., 368."

A short answer to that futile objection is contained in the subsequent cases of Huntington *v.* Laidley, 176 U. S., 668; Arkansas *v.* Schlierholz, 179 U. S., 398. In the case first named it was said:

> "In order to maintain the appellate jurisdiction of this Court in this case under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. *This may appear in either of two ways:* BY THE TERMS OF THE DECREE APPEALED FROM AND OF THE ORDER ALLOWING THE APPEAL; or by a separate certificate of the Court below. Maynard *v.* Hecht, 151 U. S., 324."

and other cases cited. In this case "the definite question of jurisdiction" is certified with the greatest possible distinctness "by the terms of the decree appealed from and of the order allowing the appeal." Both appear in the

following form upon the face of the final decree (R., pp. 48–49):

> "This cause having heretofore come on for hearing on the bill and special demurrer hereto and the answer and replication, and the evidence, and came the parties complainant and defendants by their solicitors, and the Court being sufficiently advised in the premises, and being of the opinion that the said demurrer is not well taken, it is therefore considered and so ordered, adjudged and decreed that said demurrer *as to the jurisdiction of this Court* be and the same is hereby overruled, and the defendants thereupon as to the matters in said demurrer, *so far as the jurisdiction of the Court is concerned, elected to stand thereon, and declined to plead farther, and then and there excepted to the action of the Court,* * * * . And the Court farther ordered, adjudges and decrees over complainant's objections that the defendant be allowed to appeal said cause direct to the Supreme Court of the United States upon the execution of bond in the sum of $1,000 to the Supreme Court of the United States."

Thus it appears both from "the terms of the decree appealed from and by the order allowing the appeal" that the "definite question of jurisdiction" has been sent to this Court from the Circuit Court as perfectly as if a separate certificate had been written. All of which is respectfully submitted.

CLAUDE CLAYTON,
Assistant Attorney-General
of the State of Mississippi.
HANNIS TAYLOR,
WILLIAM D. ANDERSON,
Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1911.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellee.

No. 903.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

REJOINDER BRIEF FOR APPELLANTS.

CLAUDE CLAYTON,
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PRESS OF GIBSON BROTHERS
WASHINGTON, D. C.
1912

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., *Appellants*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

REJOINDER BRIEF FOR APPELLANTS.

I.

Counsel for appellants again join with counsel for appellee in the statement that the question at issue is one purely of jurisdiction. The jurisdiction of the Circuit Court over this case depended entirely upon *the allegation of diverse citizenship*, and the burden is upon appellee to demonstrate that such jurisdiction has been clearly and positively averred in the bill, as it is not sufficient that jurisdiction may be inferred argumentatively from the pleadings. It is distinctly averred in the bill—

> "That complainant [the Louisville and Nashville Railroad Company] is a railroad corporation created

> and organized under the laws of Kentucky, and has its principal place of business in Louisville, Kentucky, and is a citizen of said State."

But the bill then proceeds to show that, by no possibility, can that Kentucky corporation be the real complainant; its allegations put the fact beyond all question that the Kentucky corporation *only bears certain relations* to another distinct corporation operating a railroad in Mississippi under the same name. What those certain relations are between the two corporations the bill refuses to disclose. The necessary inference is that the Kentucky corporation owns a controlling interest in the stock of the corporation operating a railroad in Mississippi under the name of the Louisville and Nashville R. R. Co. Thus the vital question remains: *What is the citizenship of the corporation which is the real complainant in this bill*—the corporation originally organized by virtue of the laws of the State of Alabama under the name of the New Orleans, Mobile and Chattanooga R. R. Company, a name subsequently changed to the New Orleans, Mobile and Texas Railroad Company. After the property and franchises of that corporation had been sold at foreclosure sale, the Louisville and Nashville R. R. Co. *entered into some kind of relations with the purchasers who bought that part of the property situated in the State of Mississippi*, and extending through the counties of Jackson, Harrison, and Hancock of that State. The only light as to the relations of the Kentucky corporation with the purchasers of the property of a corporation originally created by the laws of Alabama is contained in this paragraph of the bill (R., p. 2):

> "The railroad so owned and operated by complainant in the State of Mississippi extends from the city of Mobile, through the counties of Jackson, Harrison

and Hancock, in the State of Mississippi, to the city of New Orleans in the State of Louisiana, and was originally built by a corporation created by and organized under the laws of the State of Alabama under the name of the New Orleans, Mobile and Chattanooga Railroad Company. The name of said corporation was subsequently changed by an act of the legislature of the State of Alabama to the New Orleans, Mobile and Texas Railroad Company. The said company mortgaged its property and franchises, and made default under the terms of its said mortgage; its property and franchises were foreclosed and sold to satisfy said mortgage, and the purchasers at said sale organized a NEW CORPORATION [*by the laws of what State was the 'new corporation' created? Necessarily by the laws of Mississippi*] under the name of the New Orleans, Mobile and Texas Railroad Company, as re-organized, and thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and description, except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and interstate freight and passengers as aforesaid."

That dim and misty averment, *touching the vital question as to the citizenship of the corporation, really complainant in this suit*, is even excelled in dimness and mistiness by the following contained on pages 3 and 4 of appellee's reply brief:

> "AS TO THE CITIZENSHIP OF THE CORPORATION WHOSE PROPERTY AND FRANCHISES WERE PURCHASED BY APPELLEE.
>
> "The record shows that the appellee obtained the property and franchises exercised by it in the State of Mississippi by purchase from a corporation which had purchased such property and franchises at a fore-

closure sale of the properties, rights and franchises of the New Orleans, Mobile and Texas Railroad Company (which was the altered name of the New Orleans, Mobile and Chattanooga Railroad Company), which last named corporation was organized under the laws of Alabama, and granted rights and franchises in the State of Mississippi by an act of the Legislature of that State approved February 7, 1867. In appellant's brief it is first contended that under the act of the Legislature of Mississippi of February 7, 1867, the New Orleans, Mobile and Chattanooga Railroad Company was a citizen of the State of Mississippi, and then, on page 12 of their brief, they contend that:

"'No matter what conclusion the Court may reach as to the legal effect of the act of February 7, 1867, it will find no room to doubt that an original and distinct Mississippi corporation was created by the act of March 8, 1882.'"

Neither from the allegations of the bill nor from the brief of counsel is it possible for this Court to ascertain the citizenship of the corporation now doing business in the State of Mississippi, in the counties of Jackson, Harrison and Hancock, under the name of the Louisville and Nashville Railroad Company, if it is not a Mississippi corporation. Under the allegations of the bill it is impossible even to infer that such corporation was ever created *by the laws of Kentucky*; no such allegation is made in any form. Neither is it alleged directly that such corporation now exists under the laws of Alabama. There is no claim that an Alabama corporation is before the Court as complainant. Is the conclusion not irresistible that, if the real facts had been frankly and fully averred in the bill, it would clearly appear that, after the foreclosure sale of October, 1881, those who thus became possessed of the property reorganized as a corporation under the Mississippi act of 1882 entitled "An Act to authorize purchasers of railroads

under execution or decrees of foreclosure, to organize as incorporated companies, and for other purposes."

As the bill has failed to aver *in clear and positive terms the citizenship of the corporation, which is the real complainant,* it must suffer the fate which the rules of federal procedure prescribe in such cases.

> "The rule is well settled that, as the courts of the United States are of limited jurisdiction, the presumption is against the jurisdiction, unless upon the face of the record the contrary affirmatively appears. Robertson *v.* Cease, 97 U. S., 646. It is furthermore required that the fact or facts upon which jurisdiction is sought to be found, shall be clearly and positively stated * * * Thus, in Insurance Co. *v.* French, 18 Howard, 404, the averment was that the plaintiffs, citizens of Ohio, complained 'of the Lafayette Insurance Company, a citizen of the State of Indiana,' and it was held by the Supreme Court that 'this averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation or, if it be such, by the law of what State it was created.'" Lonergan *v.* Illinois Cent. R. Co., 55 Fed., 551.
>
> "It is not sufficient that jurisdiction *may be inferred argumentatively* from the pleadings." Rose, Code of Fed. Pro., Vol. 1, p. 33, citing Brown *v.* Keene, 8 Pet., 112; Robertson *v.* Cease, 97 U. S., 646; Continental Ins. Co. *v.* Rhoads, 119 U. S., 240.

In Penn. *v.* Quicksilver Min. Co., 10 Wall., 553, Justice Nelson said:

> "The Court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that State by its agent; but not that it had been incorporated by the laws of the State. *It would have been very easy to have*

made the fact clear by averment, and being a jurisdictional fact, it should not have been left in doubt."

So in this case the bill should have set forth clearly, by specific averments, how the purchasers of the property within the State of Mississippi were incorporated after the sale, how they sold the property to the corporation created by the laws of Kentucky, so that the Court could see *what are the existing relations between such corporations.* So obscure are all these things, upon the face of the bill, that no sound inference can be drawn in relation to them, if the corporation in question is not a Mississippi corporation.

> "If it [a corporation] comes into court alleging its incorporation in both states it cannot maintain suit against a citizen or corporation of either State, since such a pleading is deemed to show a joinder of two plaintiffs who are citizens of two different states." Rose's Code of Fed. Pro., vol. 1, p. 26, citing Ohio & Mississippi R. Co. *v.* Wheeler, 1 Black., 297; Louisville R. Co. *v.* Louisville Trust Co., 174 U. S., 563.

If this bill does not show that the corporation in question is a domestic corporation of Mississippi, created under the act of 1882, *then it does show that two corporations are complainants,* the one the creation of the State of Kentucky, the other the creation of the State of Alabama, a condition of things fatal to the bill. Again,

> "A consolidation of two corporations works a dissolution of the original concerns and creates a new corporation, unless the legislature otherwise intend." Rose's Code of Fed. Pro., vol. 1, p. 26, citing Cent. R. R. and Banking Co. *v.* Georgia, 92 U. S., 665.

It is impossible for any court to determine the citizenship of the corporation created in Mississippi after the foreclosure sale of October, 1881, if the inference is rejected that the purchasers at that sale did not organize thereafter under the terms of the act of 1882, entitled "An act to authorize purchasers of railroads under execution or decrees of foreclosure, to organize as incorporated companies, and for other purposes." Certainly there was some kind of reincorporation of the property in the State of Mississippi, after the Alabama corporation ceased to exist. Why does not appellee's brief explain that mystery to this Court? The bill does not disclose the facts on that point, neither does the brief for appellee. Under that condition of things this Court must apply its unbending rule and dismiss the bill for want of jurisdiction in the Circuit Court, *because such bill fails to show affirmatively what the citizenship of the corporation really complainant is.*

IF THE CORPORATION REALLY COMPLAINANT IS NOT A DOMESTIC CORPORATION OF THE STATE OF MISSISSIPPI, IT IS IMPOSSIBLE FOR THE COURT TO REASON OUT, EVEN ARGUMENTATIVELY, THE STATE TO WHICH ITS CITIZENSHIP BELONGS.

We here repeat the contentions made in our original brief, first, that under the act of February 7, 1867, the New Orleans, Mobile and Chattanooga Railroad Company was a citizen of the State of Mississippi; second, that no matter what conclusion the Court may reach as to the legal effect of that act, it will find no room to doubt, when the misty and confused allegations of the bill on that subject are taken as a whole, that an original and distinct Mississippi corporation was created by the act of March 8, 1882. If this Court does not accept those views, it is at sea as to the citizenship of the corporation really complainant. If the Court is of opinion that the allegations of the bill assert the

fact that two corporations are complainants, the one the creation of the laws of Kentucky, the other the creation of the laws of Alabama, then the bill must be dismissed because "such a pleading is deemed to show a joinder of two plaintiffs who are citizens of two different States." If the Court is of opinion that there has been a consolidation, in Mississippi, of the Kentucky corporation and the corporation originally created by the laws of Alabama, then the result of that consolidation was a new corporation, unless the legislation of Mississippi otherwise intended. The Federal courts decline to speculate upon such hypotheses when a jurisdictional fact is involved. Where the jurisdiction depends upon diverse citizenship, and a corporation is a party, its citizenship must be clearly and distinctly averred in an allegation explaining "by the law of what State it was created." In the words of Justice Nelson, heretofore quoted, "It would have been very easy to have made the fact clear by averment, *and being a jurisdictional fact*, it should not have been left in doubt." As appellee has failed to follow that unbending rule its bill must be dismissed.

II.

In the "Reply brief for appellee" no attempt has been made to answer the all-important contention that the prior lawful possession of this case by the Chancery Court of Harrison County, Mississippi, confers exclusive jurisdiction upon that State Court until it is there ended. The bill is this case avers such prior possession, and exhibits the bill or information under which the State Court took prior jurisdiction. If anything is settled in Federal law it is this:

"When a State Court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases." Freeman *v.* Howe, 24 How., 450; Buck *v.* Colbath, 3 Wall., 334; Taylor *v.* Tanitor, 16 Wall., 366; *Ex parte* Croude, 122 U. S., 178; Harkrader *v.* Wadley, 172 U. S., 164.

The quotation heretofore made from Brannon, *The Fourteenth Amendment*, p. 477, covers the whole matter:

"COURT FIRST IN POSSESSION OF CASE.—Suppose a State court has lawful possession of a case, and the party takes a notion that he prefers the federal forum. Though it is a case which might have been originally brought in a Federal court, yet having begun in a State court, that court has a right to finish it, because of the rule that between courts of concurrent jurisdiction the court which first obtains possession of a case retains it to the end. (Ward *v.* Todd, 103 U. S., 327; Central Nat. Bank *v.* Stevens, 169 U. S., 432, 459; Harkrader *v.* Wadley, 172 U. S., 148; Parsons *v.* Snider, 42 W. Va., 517; Oliver *v.* Parlin & Orendorf Co., 105 Fed., 272.) So the party must remove his case *or let it go on to final judgment in the State court, and to the highest State court by appeal, and then go to the United States Supreme Court by appeal. He cannot, while his suit is pending in the State court, sue in in the United States Circuit Court.*"

Thus appellee, no matter what its citizenship, had no right to go into a Federal court when a State court of concurrent jurisdiction was in full possession of the case. For that reason this bill should be dismissed. In due time the case from the Chancery Court of Harrison County will, no doubt, be here on writ of error to the Supreme Court of Mississippi where it is now pending.

III.

We do not consider it necessary to do more than make a passing reference to the barren technicality, *entirely unsupported either by reason or any authority*, to which appellee's counsel have appealed as an answer to our contention, based on Huntington *v.* Laidley, 176 U. S., 668, that the question of jurisdiction has been properly and very explicitly certified *by the terms of the final decree*, as directed in the case just cited. Appellee's brief admits that the final decree does contain all that the rule laid down in Huntington *v.* Laidley requires, but it adds that the decree also refers to some other matters. We respectfully submit that that fact is of no legal significance whatever. This court deals far less with empty forms than with substance. All of which is respectfully submitted.

CLAUDE CLAYTON,
Assistant Attorney-General of the State of Mississippi.
HANNIS TAYLOR,
WILLIAM D. ANDERSON,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., - - Appellants,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Notice and Motion by Appellee to Dismiss or Affirm.

GREGORY L. SMITH,
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MARCELLUS GREEN,
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Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., - - - - - - - - - *Appellants,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Notice and Motion by Appellee to Dismiss or Affirm.

NOTICE.

To Hon. Ross Collins, Attorney General of the State of Mississippi, Counsel for Appellants:

Please take notice that the undersigned, as counsel for appellee, will move the court at the opening of its session on Monday, April 22, 1912, at or about the hour of noon, or as soon thereafter as the business of the court will permit, to dismiss the above styled appeal or affirm the decree appealed from, on the printed briefs of counsel filed, on the ground that the questions on which the decision of the cause depends are so frivolous as not to need further argument, a printed copy of the brief of argument of appellee's counsel and of the motion to be made as aforesaid being herewith furnished and served upon you.

This March 28, 1912.

GREGORY L. SMITH,
HENRY L. STONE,
Counsel for Appellee.

MARCELLUS GREEN,
GARNETT WYNN GREEN,
Of Counsel.

Supreme Court of the United States

October Term, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., - - - - - - - - - *Appellants,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

MOTION.

This day came Gregory L. Smith and Henry L. Stone, counsel for appellee, pursuant to notice served upon Ross Collins, Attorney General of Mississippi, counsel for appellants, and moved the court to dismiss the above styled appeal or affirm the decree appealed from, on the printed briefs of counsel filed, on the ground that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

GREGORY L. SMITH,
HENRY L. STONE,
Counsel for Appellee.

MARCELLUS GREEN,
GARNETT WYNN GREEN,
Of Counsel.

Supreme Court of the United States

October Term, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., - - - - - - - - - *Appellants,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Service and Acceptance of Notice by Appellants' Counsel.

Service of the notice, together with a printed copy of the brief of argument of appellee's counsel, and a copy of the motion to dismiss or affirm above mentioned, set for April 22, 1912, is hereby acknowledged.

This March 28, 1912.

ROSS COLLINS,

Attorney General of the State of Mississippi, Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL., - - - Appellants,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLEE.

GREGORY L. SMITH,
HENRY L. STONE,
Attorneys for Appellee.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel.

Westerfeld-Bonte Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 903.

Railroad Commission of the State of Mississippi, et al., - - - - - - - - - Appellants,

versus

Louisville & Nashville Railroad Company, - Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLEE.

The statement made by the appellants is controverted in several particulars, and the case is, therefore, here re-stated.

STATEMENT OF THE CASE.

The only error assigned is upon the decree of the court overruling the demurrers to the original bill of complaint. (Rec. p. 52.)

The bill alleges the following facts:

The Railroad Commission of Mississippi made an order requiring certain passenger trains of the appellee (Louisville & Nashville Railroad Company) engaged in *interstate* business to stop at a point in Bay St. Louis, in the State of Mississippi, in addition to stopping at the company's regular depot in that city. (Rec. p. 8.)

The railroad company failed to comply with this order, and the *Railroad Commission* caused a bill in equity to be filed against it, in the Chancery Court of *Hancock* County, Mississippi, to compel the railroad company, by a mandatory injunction, to compel compliance with the order of the Railroad Commission. (Rec. pp. 8 and 9.) The appellee removed that cause to the appropriate Circuit Court of the United States. The ground for the removal was diversity of citizenship. (Rec. p. 9.)

The Attorney General of the State of Mississippi then filed, in the name of that *State* as complainant, a bill in equity in the Chancery Court of *Harrison* County, Miss., alleging that by the removal of said cause from the Chancery Court of Hancock County, Miss., to the Federal Court, the appellee had forfeited its right to further continue to do an intrastate business in the State of Mississippi, and had incurred certain penalties. (Rec. pp. 11 and 12.)

The bill in that case prayed that appellee be enjoined from further engaging in *intrastate* business in the State of Mississippi, and for the recovery of penalties. (Rec. p. 13.)

The Act of the Legislature of Mississippi under which the forfeiture of the right of appellee to do business in Mississippi was sought to be enforced, and under which the penalties were sought to be recovered, was approved March 20, 1908, and reads as follows:

> AN ACT prescribing the terms and conditions on which foreign public service corporations shall engage in business in this State, and fixing penalties for the violation of same.
>
> Section 1. Be it enacted by the Legislature of the State of Mississippi, That any foreign railroad, sleeping car, electric railway, telegraph or telephone corporation, or other public service corporation whatsoever, now engaged in business in this State, or which may come into the State hereafter, and engage in business here, which shall, when sued in any court in this State, remove such cause to a Federal court of this State, or which shall institute any suit in a Federal court of this State, which it could not maintain if it were not a domestic company incorporated and organized under the laws of this State, shall:
>
> (a) Forfeit its right to, and be prohibited from engaging in intrastate commerce within the State.
>
> (b) Forfeit its right of eminent domain, and be prohibited from further exercising the same in this State.
>
> And any such corporation so removing a cause to the Federal court, or instituting a suit therein, and which shall thereafter continue to engage in intrastate commerce within this State, shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such corporation shall continue to so engage in such commerce shall be a separate offense; the penalty in such cases to be recovered by an action in the name of the State, at the relation of the Attorney

General, or any District Attorney in whose district such offense may occur, and when so recovered shall be paid into the State treasury.

(Rec., pp. 9 and 10.)

The Louisville & Nashville Railroad Company then filed its bill of complaint in the United States Circuit Court for the Southern Division of the Southern District of Mississippi, against the Railroad Commission and Commissioners of Mississippi, the Attorney General of said State, and the District Attorney for the Second Circuit Court District, in which it alleged that the Chancery Court of Harrison County had no jurisdiction, under the bill in equity filed by the State of Mississippi, to enforce the forfeiture of appellee's right to do an intrastate business in Mississippi, or to recover penalties from it (Rec., p. 12); that the Act of the Legislature under which such forfeiture and penalties were claimed was void as applicable to the Louisville & Nashville Railroad Company, and that unless restrained by an injunction, the Railroad Commission and Commissioners, the Attorney General, and the District Attorney, defendants to such bill of complaint—would institute *quo warranto* or other proceedings to oust it (the appellee) of the right to do an intrastate business in Mississippi, and to recover the penalties prescribed by said Act. (Rec., p. 12.) The bill prayed that said Act be decreed void and of no effect as to the appellee, and that the said defendants be enjoined from prosecuting any *quo warranto* or other proceedings, *other than the proceeding then pending in the Chancery Court of Harrison County*, to forfeit the right of the appellee to

do an intrastate business in the State of Mississippi, or to recover penalties of it for having carried on said business after it had removed the said suit from the Chancery Court of Hancock County to the Federal Court. (Rec., p. 13.)

Appellee is a corporation created by and organized under the laws of Kentucky, and is a citizen of that State (Rec., p. 1); the defendants are each citizens of the State of Mississippi (Rec., p. 11); appellee is engaged in the common carrier railroad business, transporting freight and passengers between points in the State of Mississippi, and through Mississippi between points in different States, and between points in the State of Mississippi and points in other States, and has been so engaged both in interstate and intrastate freight and passenger business, in the State of Mississippi, for more than twenty-five years. (Rec., p. 2.)

The railroad operated by appellee was constructed by the New Orleans, Mobile & Chattanooga Railroad Company, a corporation created by and organized under the laws of Alabama (Rec., p. 2). By the charter of said company, granted to it by the State of Alabama, it was authorized to borrow money and execute bonds, and to secure the same by mortgage upon its property and franchises (Rec., p. 3); there was also vested in said corporation, by its Alabama charter, all of the usual powers necessary and incident to the operation of a railroad; among other things it was authorized to exercise its corporate powers within the State of Alabama, and also within any other States of the United States that should

recognize the existence of said corporation, and sanction, authorize or permit the exercise of said corporate powers within its limits. The State of Mississippi, by an Act approved February 7, 1867, recognized the existence of said Alabama corporation and authoized it, as an Alabama corporation, to build and operate its railroad, and exercise its powers, in the State of Mississippi. (Rec., p. 3.)

The title of said Act of the Legislature of Mississippi, and the first section thereof, read as follows:

> AN ACT in relation to the New Orleans, Mobile & Chattanooga Railroad Company, *a corporation of the State of Alabama,* and authorizing and empowering the said company to exercise and enjoy its corporate powers and franchises in the State of Mississippi.
>
> Section 1. Be it enacted by the Legislature of the State of Mississippi, that the New Orleans, Mobile & Chattanooga Railroad Co., a corporation incorporated, organized, and existing under and by virtue of its act of incorporation, *duly enacted by the Legislature of the State of Alabama,* entitled 'An Act to incorporate the New Orleans, Mobile & Chattanooga Railroad Company,' approved November 24, 1866, is hereby recognized and approved as a body politic and corporate, with all the powers, privileges, rights and franchises granted to it by said State of Alabama, in and by its Act of incorporation, hereby adopting, confirming and approving all of the provisions in said Act of incorporation granted to said Company, so far as the same may be applicable to this State, and may be adopted, approved and affirmed thereby, and are not contrary to the general statutes thereof. *Said company* is hereby invested with the powers, privileges and franchises granted to it in its said Act

of incorporation, and is empowered and authorized to exercise and enjoy the same in this State, and to have, exercise, and enjoy all the rights, powers, privileges, and franchises pertaining to the corporate business, within this State, necessary for the full enjoyment and exercise of the said rights, powers, privileges and franchises granted and secured to it by its said act of incorporation, and necessary to secure, attain and accomplish the objects and purposes of its incorporation, in the same manner, and with the like power and effect, as if said company had been incorporated by virtue of any grant or law of this State, subject only to the conditions, provisions and restrictions of this Act, as hereinafter set forth, and the general laws of this State.

(Record, p. 15.)

The said Act of the Legislature of Mississippi then proceeds to recite and confer upon said company, in detail, the several powers that had been conferred upon it by the Legislature of Alabama. Among the powers so recited and conferred was the power to create debts, and to mortgage its property and franchises to secure the same. (Rec., pp. 15-23.)

The New Orleans, Mobile & Chattanooga Railroad Company issued a series of bonds and executed a mortgage, or deed of trust, upon all of its property and franchises—other than the franchise to be a corporation—to secure the same. Default was made under this mortgage, or deed of trust, and it was foreclosed. The property and franchises were sold and the purchasers organized themselves into a new corporation. The bill of complaint does not show under what laws such new corporation was organized. This was prior to October 5, 1881. (Rec., p. 5.)

There were, at that time, no incorporation laws in the State of Mississippi under which such a corporation could be organized, but there were such general incorporation laws in the State of Alabama, which read as follows:

> Mortgagees, or others who may be, or become, purchasers of any railroad in this State, under any judicial or other sale, may reorganize the property so purchased in the manner provided in this article for the incorporation of railroad companies, and within 60 days after its organization, such body corporate must file a certificate thereof, by its proper officers, in the office of the Secretary of State. The purchasers are the persons who part with the actual consideration, or for whose benefit the purchase is made. In each and every case in which any railroad may hereafter be sold, or may have been sold since the ratification of the present State Constitution, in the State of Alabama, by the State, or by any commissioned officer or agent of the State, or under any proceedings, judicial or otherwise, authorized by law, the purchasers at any such sale may constitute themselves into a body politic and corporate, and shall have and possess all the powers and franchises which belonged to the company or corporation originally owning the railroad so purchased, including the power to purchase and hold real estate and the franchise to be and exist as a corporation under such name as the purchasers may select and adopt.

The purchasers of such property and franchises organized themselves into a new corporation, and in October, 1881, sold and conveyed all of such property and franchises to appellee (Louisville & Nashville Railroad

Company), complainant in the bill now under consideration. (Rec., p. 2.)

The State of Mississippi has sanctioned the purchase of said property by appellee; it assessed said property for taxation against appellee, and received payment of such taxes from it. Appellee was required to file, under oath, a schedule of all its property; to state the gross amounts of its receipts in each year; the total of its capital stock, with its par and actual value; the value of its franchises, and many other things connected with the operation of the property, and the Railroad Commission of Mississippi was required, in ascertaining the value of the property, to take into consideration the franchises; and the value of the franchises originally granted to the New Orleans, Mobile & Chattanooga Railroad Company has ever since been taken into consideration in fixing the value of appellee's property in the State of Mississippi for taxation. The State has also required appellee to file its tariff sheets of charges, to post tariff notices, and has made orders requiring it to establish a station, and to stop at a point in a city, other than its depot, and has, for many years, in other ways supervised the exercise, by appellee of the said franchises so obtained by it under the charter of the New Orleans, Mobile & Chattanooga Railroad Company. (Rec., p. 6.)

The New Orleans, Mobile & Chattanooga Railroad Company constructed its railroad in the State of Mississippi after the said Act of the Legislature of Mississippi of 1867 had been adopted, and in part upon the faith thereof. (Rec., p. 5.)

Appellee's interstate and intrastate business are, and have always been, intimately connected and conducted as one business, with one property, and by one set of officers and employes, and appellee upon the faith of the franchises obtained by it, as aforesaid, has acquired a large amount of property necessary and convenient for the conduct of said intrastate business. It has built, and been required by the laws of the State of Mississippi to build, depots and depot facilities sufficient to accommodate both its interstate and intrastate business in that State at expense of hundreds of thousands of dollars, which depots and other facilities are far in excess of what would have been necessary to enable it to handle its interstate business alone, and if deprived of the right to do an intrastate business in Mississippi, the burden of paying the interest upon the money so invested for the benefit of such intrastate business, and maintaining such expensive facilities, will be thrown upon complainant's interstate business, and become a charge thereon; and should the complainant cease to do an intrastate business, it would not be able to earn, upon the property devoted to its common carrier business in the State of Mississippi, more than the expense of doing said business. (Rec., p. 7.)

The appellants demurred to this bill; the court overruled the demurrers; the appellants then answered the bill (Rec. p. 36), the appellee filed its replication (Rec. p. 45), and the cause was tried upon the merits and the relief prayed in the bill was granted by final decree (Rec., pp. 47-48).

This appeal is taken solely from the ruling of the circuit court upon demurrer.

I.

THE JURISDICTION OF THE FEDERAL COURT WAS, BY THE BILL OF COMPLAINT, INVOKED.

1. Upon the ground of diversity of citizenship.

2. Upon the ground that the act of the Legislature of Mississippi complained of, and proceedings thereunder, would result in taking the property of complainant without due process of law; would deny to it the equal protection of the laws; interfere with and burden the interstate commerce in which it was engaged, and violate the obligations of the contract between the appellee and the State of Mississippi. (Rec., p. 13.)

II.

ONLY THREE GROUNDS OF DEMURRER ARE INSISTED UPON, AND EACH GROUND OF DEMURRER RESTS UPON THE CONTENTION THAT THE LOUISVILLE & NASHVILLE RAILROAD COMPANY WAS AND IS A MISSISSIPPI CORPORATION, AND A CITIZEN OF THAT STATE.

Appellants contend that the legal result flowing from this one fact is that the court below had no jurisdiction of the cause:

1. Because there was no diversity of citizenship.

2. Because the Act complained of in the bill is not applicable to the appellee for the reason that appellee is a Mississippi corporation.

A motion has been made by appellee to dismiss for want of jurisdiction in this court, coupled with a motion to affirm the decree appealed from.

III.

POINTS OF LAW AND BRIEF OF ARGUMENT.

The appeal in this case should be dismissed because the jurisdiction of the Circuit Court is the sole question raised, and such question has not been certified by the Circuit Court to this Court.

Maynard v. *Hecht*, 151 U. S. 324.
Colvin v. *Jacksonville*, 157 U. S. 368.

The Attorney General, counsel for appellants, concedes the said Act of 1908, to be unconstitutional and void as applied to appellee if the appellee be a corporation of the State of Kentucky. The decisions of this court would compel such concession. (*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Same*, *Ib.* 56; *Ludwig* v. *Western Union Tel. Co.*, *Ib.* 146; *Herndon* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135.)

IV.

JURISDICTION OF THE CIRCUIT COURT DID NOT DEPEND EXCLUSIVELY UPON DIVERSITY OF CITIZENSHIP.

From what has been said, it will be seen that the jurisdiction of the Circuit Court was invoked upon two separate grounds:

1. Diversity of citizenship.

2. That complainant claimed the right to relief under the Constitution of the United States, viz:

(a) The right to be protected against having its property taken without due process of law.

(b) The right to be protected against having its interstate commerce regulated and burdened by the State of Mississippi.

(c) The right to the equal protection of the laws.

(d) The right to be protected against having the obligation of its contract with the State of Mississippi impaired.

It is manifest that the mere fact—if it were a fact—that the Louisville & Nashville Railroad Company was and is a corporation under the laws of Mississippi, would not show that the Federal Court had no jurisdiction of the cause upon the other grounds invoked and relied upon in the original bill.

Ex parte Young, 209 U. S. 143.

We understand the contention of appellants to be that the Louisville & Nashville Railroad Company is a

corporation under the laws of Mississippi, and that the Mississippi Act of 1908, does not therefore apply to it, and as that Act does not apply to that company, the presumption that the defendants in the bill of complaint herein will attempt to forfeit the rights of that company to do an intrastate business in Mississippi, or to enforce penalties under said Act, does not arise, and, therefore, the complainant (appellee herein) is not entitled to any relief.

This contention does not, however, reach the question of jurisdiction. The fact that protection is, in good faith, claimed under the Constitution conferred the jurisdiction upon the Circuit Court to hear and determine whether appellee is entitled to such protection. In the case of *Pacific Electric Company* v. *Los Angeles*, 194 U. S. 112, it is said:

> In City Railway Co. v. Citizens' Railroad Co., 166 U. S. 557, the railroad company occupied certain streets of the city of Indianapolis under ordinances of the city. Subsequently the city, in pursuance of an Act of the General Assembly of the State, gave the City Railway permission to lay its track on some of the same streets which were occupied by the railroad company. The latter brought suit in the circuit court of the United States for the district of Indiana against the railway company, to enjoin it from availing itself of the privilege attempted to be granted. The court granted the relief prayed for and the case was brought here directly. A question of the jurisdiction of the circuit court was raised, and replying to it we said: 'All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which

the latter had attempted to impair.' And it was further observed whether the contract was or was not impaired could not be passed upon 'on motion to dismiss so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one.' This view was repeated in Illinois Central R. R. Co. v. Adams, 180 U. S. 28.

See also *Minnesota* v. *Northern Securities Co.*, 194 U. S. 65.

If, however, it were true that appellee is a Mississippi corporation, and that the Act of 1908 does not, therefore, apply to it, still the allegations of the bill show that the Attorney General, the Railroad Commission and Commissioners, and the District Attorney—defendants to the bill—contended that it is a foreign corporation created by the laws of Kentucky, and have filed a bill in the Chancery Court of Harrison County, Mississippi, so charging, and seeking to enforce forfeitures, and to recover penalties under the Act of 1908; and the bill further alleges that they will, unless restrained, proceed to institute further proceedings to enjoin appellee from continuing to do an intrastate business in Mississippi, and seeking to recover of it the enormous penalties prescribed by the Act of 1908, and the appellee had the right to enjoin them from the institution and prosecution of such other actions, and to thereby protect itself against irremediable injury by the enforcement against it of the said void or inapplicable Act.

Ex parte Young, 209 U. S. 144.

V.

UNDER THE ALLEGATIONS OF THE BILL OF COMPLAINT THE LOUISVILLE & NASHVILLE RAILROAD COMPANY IS NOT A MISSISSIPPI CORPORATION.

The bill of complaint shows that the Louisville & Nashville Railroad Company is a corporation organized under the laws of Kentucky, and a citizen of that State, and there is no basis whatever for the contention that it is a corporation under the laws of Mississippi and a citizen of that State. It is contended that it became a Mississippi corporation *by purchasing* the property and franchises originally belonging to the New Orleans, Mobile & Chattanooga Railroad Company. If it were conceded that the New Orleans, Mobile & Chattanooga Railroad Company was a Mississippi corporation, still it seems impossible that any one should, at this date, contend that the mere fact that a Kentucky corporation *purchased* the franchises of a Mississippi corporation, makes the Kentucky corporation a Mississippi corporation within the meaning of the Federal Judiciary Act. If such contention has ever heretofore been made, we are not aware of the fact. We have, at least, never found any consideration of such a contention.

The New Orleans, Mobile & Chattanooga Railroad Company, however, was not a Mississippi corporation. The only authority relied upon by the appellant to establish that it was, is the case of the *Memphis & Charles-*

ton R. R. Co. v. *Alabama,* 107 U. S. 545, and that case does not, in the remotest degree, support such contention. No further criticism of that case need be made than is found in the case of *Southern R'y Co.* v. *Allison,* 190 U. S. 337, where this court said:

> Considerable stress has been laid, by those holding opposite views upon the case of Memphis & Charleston R. R. Co. v. Alabama, 107 U. S. 581. It was there held that a railroad company, having been made by the statutes of Alabama an Alabama corporation, although having previously been incorported in Tennessee, could not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of that State. But in that case the company was required by the Legislature of Alabama to open books in that State for the subscription of stock in the capital of the corporation, so as to afford the citizens thereof an opportunity to take stock to the amount of a million and a half of dollars of the capital of the company. The Alabama Act also provided that the company should, at the first meeting of the stockholders, designate a time when and a place or places in Northern Alabama where, for the convenience of the citizens of the State who may be stockholders, an election for directors should be held, notice whereof was to be given in the newspapers, and elections for directors should be held at the same time both in Alabama and in Tennessee.
>
> This court held, that by reason of the particular language used in the Act, there was a separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the State of Alabama. It is stated in the opinion, page 584:
>
> 'The whole Act, taken together, manifests the understanding and intention of the Legislature of

Alabama that the corporation which was thereby granted a right of way to construct through this State a railroad, with which any railroad company chartered or to be chartered in this State should have the right to connect its road; and which was required to construct a branch railroad in this State, to open books for subscriptions of stock to a certain amount in this State, to apply the moneys here subscribed to the construction of the road within this State, and to hold elections in this State; was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the Legislature of Tennessee.'

The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the James Case, reaffirmed and approved as it is by that of Louisville, etc., Railway v. Trust Co., 174 U. S., *supra*, as decisive of the case before us.

The case before the court, in *Southern R'y Co.* v. *Allison*, was one involving the citizenship of a Virginia corporation that had complied with the laws of North Carolina that required any railroad company incorporated under the laws of any State or government other than North Carolina, which desired to own property, or carry on business, or exercise any corporate franchises within that State, to become a domestic corporation of the State of North Carolina, by filing in the office of the Secretary of State, a copy of its charter duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation was chartered and

organized, and a copy of its by-laws duly authenticated by the oath of its Secretary.

The James Case referred to, and re-affirmed, is the case of the *St. Louis & San Francisco Railroad Company* v. *James*, 161 U. S. 545. In that case the laws of Arkansas required any corporation organized under the laws of any other State, to file with its Secretary of State, certified copies of its Articles of Incorporation, and thereupon to consent to become a corporation of Arkansas. The St. Louis & San Francisco Railroad Company was a corporation organized under the laws of Missouri, but it operated a railroad in the State of Arkansas, and had filed a certified copy of its Articles of Incorporation as required by the laws of that State, and the question was whether it had thereby become an Arkansas corporation.

After reviewing the authorities upon the subject, this court said:

> It is competent for a railroad corporation, organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State.

The court also said:

> It is true that by the subsequent Act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other State,

which had heretofore leased or purchased any railroad in Arkansas, should, within 60 days from the passage of the Act, file a certified copy of its Articles of Incorporation, or charter, with the Secretary of State, and shall thereupon become a corporation of Arkansas, anything in its Articles of Incorporation, or charter, to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its Articles of Incorporation with the Secretary of State. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we can not concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution, so as to subject it, as such, to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself.

In the case of the *Pennsylvania Co.* v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S. 295, this court said:

It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its Eastern boundary, may by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one

road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an Act of the Legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the State which created it, constitutes it a corporation of Indiana.

The doctrine laid down in the foregoing quotations are fully discussed and re-affirmed in *Louisville, etc., R'y Co.* v. *Louisville Trust Co.*, 174 U. S. 561.

The Mississippi Act of 1867 expressly conferred powers upon the Alabama corporation *as such*, and made no effort to domesticate it in the State of Mississippi.

VI.

DISCUSSION OF CONFLICTING JURISDICTIONS.

On pages 12 and 13 of appellants' brief, it is said:

> Addressing ourselves to the first proposition, as to whether the railroad is or is not a non-resident Mr. Brannon, on the Fourteenth Amendment, page 427, says:
>
> 'Court First in Possession of a Case: Suppose a State court has lawful first possession of a case, and a party takes a notion that he prefers a Federal forum. Though it is a case which might have been originally brought in Federal court, yet having begun in a State court, that court has a right to finish it, because of the rule that between courts of concurrent jurisdiction, the court which first obtains jurisdiction of a case, retains it to the end. So the party

> must remove his case, or let it go on to final judgment in the State court, and to the highest State court by appeal, and then go to the United States Court by appeal. He can not while his suit is pending in the State court, sue in the United States Circuit Court.' Citing: 'Wards v. Todd, 103 U. S. page 327.'

The question attempted to be raised is not embraced either within the demurrer or within any assignment of error, and is, therefore, purely a moot question which it does not seem necessary to discuss.

The case under consideration, however, does not fall within the influence of the principle announced in that quotation. In the case at bar no effort is made to interfere with the jurisdiction of the Chancery Court of Harrison County, Mississippi, in which the Attorney General had already filed a bill in chancery in the name of the State of Mississippi, to enjoin the Louisville & Nashville Railroad Company from doing an intrastate business in that State, and to recover penalties of it. The bill in the case under discussion alleges that the Chancery Court of Harrison County had no jurisdiction of the ouster proceeding, or for the recovery of penalties, and simply seeks to enjoin the Attorney General, the Railroad Commission and Commissioners, and the District Attorney, from instituting any *quo warranto* or proceedings *other* than that already pending in Harrison County to oust the appellee of its right to do an intrastate business in Mississippi, or to recover penalties. It expressly excepts from the relief prayed, any

interference with the proceedings or judgment that may be had in the Harrison County case.

In other words, the bill proceeds upon the theory that the relief in the proceeding in the Chancery Court of Harrison County will, of necessity, fail for want of jurisdiction in that court of the cause of action, and the Attorney General and other defendants will, unless restrained, commence other and new proceedings in other State courts and seeks protection only against such *other* proceedings.

The case of *Wards* v. *Todd*, 103 U. S. 327, was one in which the Federal court undertook directly to deal with both the subject-matter and relief covered by a pending proceeding in the State court.

This question is fully discussed in the case of *Moran* v. *Turgess*, 154 U. S. 256, where this court at page 275, quoting from *Buck* v. *Colbath*, 3 Wall. 334, says:

> It is not true that a court having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits.

In the case of *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, Hunt had filed a bill in the State Chancery Court to enjoin the Western Union Telegraph Co. from

ceasing to furnish him with the quotations from the New York Cotton Exchange. He had obtained an injunction and was still receiving such quotations when the New York Cotton Exchange filed a bill in the Federal court against him, enjoining him from receiving such quotations. This court, in its opinion, said:

> The next contention of appellant is that the court had no jurisdiction to grant the injunction and pronounce the decree appealed from. The only question involved in this branch of the case, appellant says, is 'whether it comes within the provision of the Revised Statutes, 720, which is to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings of any court except in matters of bankruptcy.'
>
> And appellant insists that this suit necessarily offends that section, because under its decree he 'can not have the benefit of the judgment of the State court without being in contempt of the Federal court,' and that he is restrained by the circuit court from receiving from the telegraph company what the company is forbidden to refuse him by the State court. To sustain his contention appellant cites United States v. Parkhurst Davis Mercantile Co., 176 U. S. 317, and cases there referred to. Also Diggs v. Woolford, 4 Cranch. 179; Watson v. Jones, 13 Wall. 579; Dyall v. Reynolds, 96 U. S. 340; Central, etc., Bank v. Stevens, 169 U. S. 433. These cases do not sustain his contention. In Central Bank v. Stevens it was decided that a State court had no power to enjoin a party whose rights had been adjudged by a circuit court of the United States from proceeding with a sale of property under a decree of that court. In the other cases cited, except Watson v. Jones, the purpose was to directly enjoin parties from proceeding in the State courts. In Watson v. Jones was considered what identity of parties,

rights and relief prayed for were necessary to enable the pendency of an action in one court to be pleaded in bar in another court, and it was said: 'The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.' The principle was also expressed in that case, and sustained by authorities, that the possession of property by one court can not be interfered with by another, and, that 'the Act of Congress of March 2, 1793 (now 720 of the Revised Statutes of the United States), as construed in Diggs v. Walcott, 4 Cranch. 179, and Peck v. Jenness, 7 How. 625, are equally conclusive against any injunctions from the circuit court, forbidding the defendants in the case to take possession of property which an unexecuted decree of a State court required the marshal to deliver to them.' The case at bar has not that feature, nor has it identity with the case in the Chancery Court of Shelby County. Its parties and purposes are different. The pendency of a suit in a State court does not deprive a Feedral court of jurisdiction.

In the case filed in the Chancery Court of Harrison County the *State of Mississippi* was the sole party complainant in said cause, but is not a party to the cause here under consideration. Its purpose was to enjoin the appellee from further engaging in intrastate business in Mississippi, and to recover of it penalties as prescribed in said Act of 1908. The bill in the case at bar does *not* seek to enjoin that proceeding, but seeks to prevent—not the State—but the Railroad Commission and Commissioners, the Attorney General, and the District Attorney, from filing or prosecuting any *quo warranto* or proceedings *other* than those pending in the Chancery Court of

Harrison County to oust the appellee from doing an intrastate business in Mississippi, or to recover of it penalties under said Act of 1908. It may be that if the State is successful in the Harrison County case, the judgment in the case at bar will be fruitless, but in no event will the judgment in the case at bar interfere with the judgment in the Harrison County case. Should the judgment in the Harrison County case finally result in favor of the State, the judgment in the case at bar will not relieve the appellee from the effect of such judgment upon its intrastate business, nor will it relieve appellee of the penalties therein adjudged, but it will protect appellee from *other* proceedings by the Railroad Commission, the Commissioners, the Attorney General, and the District Attorney, to recover further penalties. Should the Harrison County case result in favor of appellee (as the Attorney General concedes it must, if that court has jurisdiction of the cause of action, because the Act of 1908, is unconstitutional and void), then the judgment in the case at bar will protect appellee not only against penalties, but also against proceedings to forfeit its charter or right to do intrastate business in Mississippi.

In further support of the doctrine of *Morgan* v. *Turgess, supra,* see *11th Cyc. of Law and Procedure,* 1004.

B. & O. R. R. Co. v. *Wabash R. R. Co.,* 119 Fed. Rep. 680.

Ogden City v. *Weaver,* 108 Fed. Rep. 566.

Sinton v. *Ampry,* 93 U. S. 548.

O'Callahan v. *O'Bryan,* 113 Fed. Rep. 936.

Bunker Hill & Sullivan Mining Co. v. *Shoshone Mining Co.*, 109 Fed. Rep. 508.

Ostby, etc., Co. v. *Cullman*, 21 Rhode Island, 280 (41 Atlantic, 201).

Something is said in appellants' brief about the inability to remove a cause involving rights claimed under the Constitution, where such claims do not appear upon the face of the pleadings. We do not understand that this question is involved in any assignment of error, nor that it has any relation to any matter properly under discussion in this case. The case at bar is not a removed case, and any discussion pertaining to the right to remove a case from the State to the Federal court seems entirely foreign thereto.

Respectfully submitted,

GREGORY L. SMITH,
HENRY L. STONE,
Attorneys for Appellee.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 903.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., - - - - Appellants,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

REPLY BRIEF FOR APPELLEE.

GREGORY L. SMITH,
HENRY L. STONE,
Attorneys for Appellee.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 903.

Railroad Commission of the State of Mississippi, et al., - - - - - - - - - Appellants,

versus

Louisville & Nashville Railroad Company, - Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

REPLY BRIEF FOR APPELLEE.

I.

SINGLE QUESTION OF JURISDICTION NOT CERTIFIED NOR SENT UP FOR CONSIDERATION BY THE CIRCUIT COURT.

The brief heretofore filed by appellee was in response to appellants' brief then on file. On January 29, 1912, appellants, without notice to appellee, withdrew their brief and filed another and different brief.

The questions *presented by the record* are, in our opinion, sufficiently covered by appellee's former brief, but appellants, in their last brief, discuss two propositions not discussed in their former brief, and rest each of these propositions upon what seems to us to be a misleading statement of the record. This seems to render it necessary for appellee to file an additional brief, pointing out wherein appellants are in error as to what the record shows with reference to those points.

In our former brief for the appellee we state, on page 12, that:

> "The appeal in this case should be dismissed because the jurisdiction of the circuit court was the sole question raised, and such question has not been certified by the circuit court to this court."

The appellant, on page 25 of their brief, in reply to this contention quote the following language from the case of *Huntington* v. *Laidley:*

> "In order to maintain the appellate jurisdiction of this court in this case under this clause, the record must definitely and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways; by the terms of the decree appealed from and of the order allowing the appeal; or by separate certificate of the court below."

For the purpose of demonstrating that the decree of the court below sent up for consideration *a single* and definite question of jurisdiction, appellants, on page 26, quote the first and last portions of the decree, but omit much that intervenes. As so quoted, the decree reads

as though there was but *a single* and definite question of jurisdiction determined by the court below and sent up for the consideration of this court.

The portion of the decree omitted shows that other questions were determined by the court below, and that they were likewise covered by the order allowing an appeal from the lower court to this court.

In other words, if the decree contained what is set out on the 26th page of appellants' brief, and contained nothing more, it might sustain appellants' contention, while, taken as a whole, it shows just the contrary of what is contended for by appellants. The final decree passed October 28, 1911, is set out on record pages 48 and 49. It shows that the court first determined the questions raised by the demurrer and then proceeded to determine the entire merits of the cause, and then allowed an appeal *not alone from its rulings upon demurrer,* but from its *entire decree,* both upon the demurrer and the merits.

II.

AS TO THE CITIZENSHIP OF THE CORPORATION WHOSE PROPERTY AND FRANCHISES WERE PURCHASED BY APPELLEE.

The record shows that the appellee obtained the property and franchises exercised by it in the State of Mississippi by purchase from a corporation which had purchased such property and franchises at a foreclosure sale of the properties, rights and franchises of the New

Orleans, Mobile and Texas Railroad Company (which was the altered name of the New Orleans, Mobile and Chattanooga Railroad Company), which last named corporation was organized under the laws of Alabama, and granted rights and franchises in the State of Mississippi by an Act of the Legislature of that State approved February 7, 1867. In appellants' brief it is first contended that under the Act of the Legislature of Mississippi of February 7, 1867, the New Orleans, Mobile and Chattanooga Railroad Company was a citizen of the State of Mississippi, and then, on page 12 of their brief, they contend that:

> "No matter what conclusion the court may reach as to the legal effect of the Act of February 7, 1867, it will find no room to doubt that an original and distinct Mississippi corporation was created by the Act of March 8, 1882."

The third paragraph of the bill of complaint, referring to the Mobile, New Orleans & Texas Railroad Company, alleges (Record page 2):

> "The said company mortgaged its property and franchises and made default under the terms of its said mortgage; its property and franchises were foreclosed and sold to satisfy said mortgage and the purchasers at said sale organized a new corporation under the name of the New Orleans, Mobile & Texas Railroad Company as re-organized, *and thereafter on October 5, 1881,* sold and conveyed all of its property and franchises of every kind and description, except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier

of interstate and intrastate freight and passengers, as aforesaid."
(The italics are ours.)

Again, as showing there is no mistake as to the true date of appellee's purchase of the railroad in question, in the fifth paragraph of its bill occurs this averment (Record, page 5):

> "Said mortgage was subsequently foreclosed, and the said property and franchises sold, and the purchasers thereof, *on October 5, 1881,* sold and conveyed said property and franchises to complainant who purchased the same upon the faith of the said several Acts of the Legislature of the said several States, and has ever since, owned and operated said railroad as a common carrier of interstate and intrastate freight and passengers as hereinbefore alleged."

It will be seen by the foregoing allegations that the purchase of appellee on October 5, 1881, was subsequent to the organization of the new corporation by the purchaser of this property at the foreclosure sale, and that the bill of complaint, therefore clearly and distinctly shows that such new corporation was organized *prior to October 5, 1881.* There is no allegation in the bill in conflict with this, and appellee, on page 7 of its former brief, distinctly stated that the new corporation was organized *prior to October 5, 1881.*

It is, of course, perfectly apparent that as this new corporation was organized *prior to October 5, 1881,* it could not have been organized under the Act of the State of Mississippi approved March 8, 1882.

The portion of the record quoted above did not escape appellants' counsel, for it will be found set out on page 5 of their last brief now on file.

Appellants' assignment of error, Record, page 53, reads, in part, as follows:

> "The bill further shows on its face that all of the property and franchises of the New Orleans, Mobile & Chattanooga Railroad was sold to satisfy a certain mortgage, in accordance with the act of 1882, and that complainant became the purchaser thereof on *October 5, 1883;* that complainant has the right and power to exercise all of the rights and powers conferred upon it and its predecessors by the Mississippi Legislature as a Mississippi corporation."

This portion of the assignment of error clearly misstates the allegations of the bill of complaint upon the material question covered by appellants' argument under criticism. There is nothing in the record to show that the sale of the property of the New Orleans, Mobile & Texas Railroad was made under the Act of Mississippi of 1882. On the contrary, the record affirmatively shows without denial or dispute that the sale and conveyance to appellee were made *on October 5, 1881.* There is nothing in the record to show that complainant purchased the property *on October 5, 1883.* On the contrary, the bill alleges that the purchase was made and consummated by deed *on October 5, 1881.*

In making their argument upon this question appellants, instead of quoting *the facts as alleged in the bill of complaint,* quoted them *from their own mis-statement*

thereof in their assignment of errors, and based their argument upon the facts as so mis-stated.

On page 18 of their brief appellants sharply criticise counsel for appellee for arguing otherwise than that the new corporation was organized by virtue of the Mississippi statute of 1882; and suggest that the argument "must have been made in momentary forgetfulness of the facts alleged in the seventh paragraph of the bill, from which it clearly appears that such new corporation was by virtue of the Mississippi statute of 1882, heretofore referred to." In view of the fact that appellants based their argument and criticism upon unwarranted and misleading assertions made in their own assignment of error, which are in direct conflict with the *facts* alleged in the bill, it is submitted that their argument, or criticism in this respect "should not have been made."

All of which is respectfully submitted.

GREGORY L. SMITH,
HENRY L. STONE,
Attorneys for Appellee.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 903. Submitted May 13, 1912.—Decided June 7, 1912.

A mere conflict between courts concerning the right to adjudicate upon a particular matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there is no right to consider on a direct appeal to this court under § 5 of the act of 1891. *Courtney* v. *Pradt*, 196 U. S. 89.

In this case *held*, that the Circuit Court in taking jurisdiction and deciding the cause on the merits, notwithstanding there was a partial demurrer to the jurisdiction, maintained its power and jurisdiction as a Circuit Court, and also necessarily decided questions arising under the Constitution expressly alleged in the bill.

Where in rendering a decree on the merits the court necessarily decided the constitutional question expressly alleged in the bill, the issue on that subject is open in this court, whether the jurisdictional question be certified or not.

THE facts are stated in the opinion.

Mr. Henry L. Stone, *Mr. G. L. Smith*, *Mr. Marcellus Green* and *Mr. Garner Wynn Green*, for appellee, in support of motion.

Mr. Hannis Taylor, *Mr. Claude Clayton* and *Mr. W. D. Anderson* for appellants, in opposition thereto.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is before us on a motion to dismiss or affirm. The confused state of the record requires, in order to make clear the considerations which control us in dispos-

ing of the motion, a fuller statement than otherwise would be necessary.

On August 5, 1908, a suit in equity was commenced in the Chancery Court of Hancock County, Mississippi, against the Louisville & Nashville Railroad Company to compel obedience to an order of the State Railroad Commission of Mississippi requiring the stoppage of certain interstate trains at a particular place. Upon the ground of diversity of citizenship, the railroad company removed the cause into the appropriate Circuit Court of the United States. Thereupon proceedings were commenced in the Chancery Court of Harrison County, Mississippi, against the railroad company to enforce an act of the legislature of Mississippi approved March 20, 1908, known as the anti-removal statute, by perpetually enjoining the company from engaging in intrastate commerce within the State of Mississippi and by subjecting it to large pecuniary penalties. It was specifically averred in the bill that the railroad company was a corporation organized and existing under the laws of the State of Kentucky, and that it had never been incorporated under the laws of Mississippi.

This case was then commenced on behalf of the railroad company in the court below against the Railroad Commission and various officials of the State of Mississippi to enjoin the commencement of any other proceeding than that pending in Harrison County, having for its object the enforcement of the forfeiture and penalty provisions of the act of 1908, which act was assailed as repugnant to the commerce clause, the contract clause and to specified provisions of the Fourteenth Amendment. The Chancery Court of Harrison County was also averred to be without jurisdiction of the suit pending before it. The complainant railroad company was alleged to be a corporation created and organized under the laws of Kentucky and a citizen of said State, having its principal place of business at Louisville, Kentucky. The defendants were alleged to

be citizens of the State of Mississippi. It was further alleged that the complainant, as a corporation as aforesaid, owned and operated as a common carrier a railroad between Cincinnati and New Orleans passing through various counties in the State of Mississippi, and that it had been for more than twenty-five years engaged in the operation of a portion of its road so situated in Mississippi. Evidently for the purpose of laying the basis for a claim of contract right the facts concerning the construction of the road operated by the complainant in the State of Mississippi were stated in substance as follows: In 1866 the legislature of Alabama incorporated what was known as the New Orleans, Mobile and Chattanooga Railroad Company, and authorized it to build a railroad from Mobile to New Orleans; an act of the legislature of Mississippi, passed in 1867, which was attached as an exhibit to the bill, authorized and empowered the Alabama corporation "to exercise and enjoy its corporate power and franchise in the State of Mississippi." An act of the legislature of Louisiana authorized the same corporation to construct its road from the Mississippi state line to New Orleans; and an act of Congress approved in March, 1868 (March 2, 1868, 15 Stat. 38, c. 15), empowered the corporation in the construction of its road to build bridges over navigable waters in the State of Mississippi. There were also averments of the placing by the Alabama corporation of a mortgage upon its property and the subsequent construction of the road from Mobile to New Orleans; a change of the name of the railroad by the legislature of Alabama to the name of the New Orleans, Mobile and Texas Railroad; default in the payment of bonds; a foreclosure sale; the incorporation of the purchasers by the name of the New Orleans, Mobile and Texas Railroad Company, as reorganized. It was then specifically alleged that said company "thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and

description except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and intrastate freight and passengers as aforesaid."

Proceedings contained in the transcript, to which we shall hereafter have occasion to refer, as well as the index to the transcript as filed, contained in the printed transcript, establish that a demurrer was filed to the bill of complaint, which is not in the printed record, and we do not therefore refer to the same. Nearly three years after the filing of the bill what was styled "Partial Demurrer to Original Bill" was filed in the cause. This demurrer charged, first, that the court was without jurisdiction because on the face of the bill it was shown "that the complainant, the Louisville & Nashville Railroad Company, is a Mississippi corporation, and that the defendants are also citizens of Mississippi, and that therefore there is no diversity of citizenship between the parties to give the court jurisdiction of the cause." This claim was solely attempted to be supported by argumentative statements in the demurrer as to the effect of the averments in the bill concerning the history of the portion of the road in Mississippi, its construction by an Alabama corporation, the legal effect of the Mississippi act of 1867 authorizing the Alabama corporation to build a road in Mississippi and the supposed operation of an act of the legislature of Mississippi of 1882 upon the purchase of the road built in that State following the foreclosure, which, it was averred, took place in 1883 after the passage of the act of 1882, instead of in October, 1881, as averred in the bill. As an additional and independent ground of demurrer, it was claimed that the suit should be dismissed because "at the time the suit in the case of *State* v. *Louisville & Nashville Railroad Company* was filed in the Chancery Court of Hancock County, Mississippi, there was no Federal question on the face of the bill which authorized its removal under

the Constitution and Laws of the United States, and said suit is made an exhibit to this demurrer for the purpose of considering the same."

On the day the "Partial Demurrer" was filed an answer was filed, which was divided into numbered paragraphs corresponding to the numbered paragraphs of the bill. The citizenship of the plaintiff was neither admitted nor denied, and we think it suffices from the view we take of the case to say that the answer in one mode or another dealt mainly with the averments of the bill respecting the history of the organization of the New Orleans, Mobile & Chattanooga Railroad Company, the construction of the road in Mississippi, the sale under foreclosure, the purchase, etc. A few days afterwards a general replication was filed, and on the same day a stipulation was entered into between counsel in the first paragraph of which it was provided as follows:

"That this cause may be submitted and heard at the May term, 1911, of said court at Jackson, and that the time for taking proof under the rules is waived, and that said cause may be heard on the original bill, partial demurrer, and partial demurrer and replication by the Court, and that setting the cause for hearing under this agreement shall not operate to admit the allegations of the answer."

The foregoing was followed, in the next paragraph of the stipulation, by a provision for a hearing of the cause "upon the bill and answer and replication upon the testimony theretofore taken by affidavits . . . and any other evidence that may be offered orally by either side on the hearing," and various specified printed charters and statutes which were enumerated and which concerned facts alleged in the bill and answer were stipulated to be admitted in evidence.

While it is certain that on or before October 24, 1911, the court entered a final decree in favor of the complainant, perpetually enjoining the enforcement of the Missis-

sippi statute complained of, the exact form of that decree is not disclosed, for although there is a paper in the record which in one aspect apparently states the terms of the decree, in another aspect it is uncertain whether the paper referred to is anything but a motion made by the defendants for the modification of the decree. Be this as it may, the record leaves no doubt that on October 28, on the motion of the defendants, a new and changed form of final decree was entered, which was deemed to conform to the stipulation for submission. In this new decree it was first recited that the case had been submitted to and considered by the court primarily upon the partial demurrer, and that on such demurrer being overruled the defendant had elected to stand thereon, and had not excepted to the final decree on the merits. There was a recital in the concluding paragraph of the decree that a direct appeal to this court was allowed, notwithstanding the objection of the complainant.

In the printed transcript there is a paper styled Specifications of Error, which is undated and uncertified, but which we will assume was filed at the time the appeal was allowed. This paper is confined to a reiteration of the contentions as to want of jurisdiction of the court below as stated in the Partial Demurrer, adding the following:

"And, because, the bill shows on its face that the Federal Court is without jurisdiction, and could not hear and determine the issues raised by the said bill of complaint because the Louisville and Nashville Railroad is a Mississippi Corporation, and the Act of 1908, which prevents the removal of causes of foreign corporations to the Federal Court, had no reference and application to the said Louisville and Nashville Railroad Company, which is a domestic corporation; and because the Act of 1908, referred to in said Bill of complaint, enacted by the Mississippi Legislature is unconstitutional and void, and in contravention of the Federal Constitution."

The appellee moves to dismiss or affirm and in the brief of counsel the ground for the motion to dismiss is thus stated:

"The appeal in this case should be dismissed because the jurisdiction of the Circuit Court is the sole question raised, and such question has not been certified by the Circuit Court to this Court."

The appellants, while concurring that jurisdiction is the sole question involved, insist that that question is adequately presented by the action of the court or sufficiently appears upon the face of the record to give power to review, and, meeting the motion to affirm, it is insisted that the court below erred in holding that there was a sufficient averment of diversity of citizenship in the bill to give jurisdiction as a Federal court and that even if this were not the case the court erred in taking jurisdiction because the subject-matter of the controversy prior to the institution of the suit below, as shown by the bill, was involved in and pending before a state court as the result of the action brought against the railroad company to enforce the Mississippi statute. The appellee, replying to these contentions and reiterating that the jurisdictional question was the sole question presented, yet proceeds to urge that even if the view be taken that the court below was wrong in deciding that adequate diversity of citizenship was alleged, nevertheless the judgment should be affirmed because of the existence of the constitutional question concerning the repugnancy of the Mississippi statute to the Constitution of the United States as to which the decision of the court was clearly right and not objected to. It becomes at once apparent when the contentions of the parties are thus summed up that the propositions urged on both sides are conflicting and irreconcilable one with the other, since both in effect insist that the sole question on which the direct appeal may rest is one of jurisdiction and yet at the same time urge that the juris-

dictional question is not the sole question because of the existence of one involving the construction of the Constitution of the United States. This is so obviously true as to the position taken by the appellee as to need only statement. That it is also true as to the position of the appellants is demonstrated by observing that it has long since been settled that a mere conflict between courts concerning the right to adjudicate upon a particular subject-matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there would be no right to consider if the direct appeal involved solely a question of jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89, 91, and cases cited.

The confusion in the contentions of the parties which thus appears, in our opinion will be dispelled and the questions for decision be made apparent by a consideration of the statement heretofore made. From that statement we think there is no real room for controversy: First. That the court below in taking jurisdiction of the cause and deciding it notwithstanding the partial demurrer maintained its power and jurisdiction as a Federal court; Second. That in rendering a decree on the merits the court necessarily decided the question or questions under the Constitution expressly alleged in the bill. This conclusion dispenses with the necessity of considering the question of certificate as to jurisdiction, since the issue on that subject, whether certified or not, is open, in view of the constitutional questions raised in the bill. *Chappell* v. *United States*, 160 U. S. 499, 509.

While logically this view would adversely dispose of the motion to dismiss, it would undoubtedly, as a general proposition, require the granting of the motion to affirm without passing upon the question of diversity of citizenship, since, from the statement we have made of the case, it appears that the correctness of the decision below as to the constitutional question was in effect conceded. We

think, however, there is room for concluding that the argument on behalf of the appellants, upon the theory that it is justified by the record, proceeds upon the hypothesis that if there was no diversity of citizenship, the statute assailed in the bill was on its face so plainly inapplicable to the situation as to cause the assertion of its repugnancy to the Constitution to be unsubstantial and frivolous and therefore insufficient to afford a basis either for jurisdiction in the court below or to warrant an affirmance by this court of the decree which was made below. As even although the premise upon which this proposition rests be not conceded, the demonstration of its unsoundness would require a consideration of the subject of diversity of citizenship and the relation of that subject to the assault made by the bill upon the statute, to avoid unnecessary analysis we come at once to consider the sufficiency of the averments of the bill as to the diverse citizenship of the complainant.

The whole argument as to the citizenship of the complainant turns not upon an express denial by the appellants in any form of the Kentucky citizenship of complainant directly alleged in the bill, but upon an insistence that the express averment upon that subject is so qualified by the subsequent allegations recounting the history of the road in Mississippi as at least to engender doubt sufficient to destroy the effect of such positive averment. No statement in the bill directly and expressly giving rise to such result is relied upon, but the whole contention is that by inference or subtle analysis of various paragraphs of the bill it must follow that the result above stated arises. Without, however, undertaking to restate the passages in the bill relied upon or to follow the forms of statement by which the result claimed to arise from the bill is sought to be demonstrated, we content outselves with saying that we think the conclusion deduced from them is unwarranted, for the following reasons: *a.* Because the passages

in the bill relied upon to create the doubt or inconsistency when construed in connection with the context had reference to the alleged impairment of the obligation of a contract and were not addressed to the subject of citizenship; *b.* Because it would do violence to the very purpose of the bill to attribute to it the self-destructive effect which would result from upholding the contention insisted upon, especially in view of the nature and character of the litigation and the relation of the parties to the subject-matter in controversy. We say this because the very object of the bill was to prevent the State from enforcing against the company, as a foreign corporation owning and operating the road in Mississippi, a forfeiture and penalties which it is admitted would not have been applicable to the corporation if it was a domestic corporation of Mississippi. Nothing could make the conditions stated clearer than to recall the argument, heretofore adversely disposed of, which was pressed upon our attention by counsel for appellants to demonstrate that the court erred in exerting jurisdiction because of the pendency of the suit in the state court brought by the State of Mississippi wherein it was expressly averred that the railroad company was a corporation of the State of Kentucky and that it had never been incorporated in the State of Mississippi.

From these considerations it results that the judgment below must be and it is

Affirmed.